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Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert and Cartelization

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CHANGING PARADIGMS IN THE PUBLIC POLICY OF STRIKER REPLACEMENTS: COMBINATION, CONSPIRACY, CONCERT AND CARTELIZATION†

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[A] strike can be conducted up to a certain point with perfect legality. . . . If that is all we can do, we may be defeated by the masters making arrangements with other people who may be willing to work for them, either by taking the work home, or by working for less wages than we think is right, and unless we can stop that our strike may be ineffective. Then comes the struggle.[1]

I. INTRODUCTION

In a bygone era, the legal relationship of employers and workers was described in terms of master and servant, reflecting the balance of power between the two groups. While such terminology is now archaic, workers and employers continue to be bound by power relationships. In simple terms, employers have the right to set wages, to determine working conditions and to terminate employment. Workers have the right to quit their employment. In certain circumstances, workers who want to pressure their employer to improve wages or working conditions may engage in a work stoppage, a *temporary* cessation of work. If they act in concert, their work stoppage may be characterized as a strike. A key issue for striking workers is whether an employer may hire *permanent* replacements, rather than *temporary* replacements. Where the law gives

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[1] J. Lyons & Sons v. Wilkins, [1896] 1 Ch. 811, 822.

employers this right, it empowers employers effectively to terminate the employment relationship.

From organized labor's perspective, nothing has done more to undermine the balance of power between employers and workers than the right of employers to hire permanent striker replacements. The result of this practice is the enervation of the system of collective bargaining, in which workers and employers negotiate wages and working conditions.[2] Increasing numbers of employers provoke union-represented workers to strike, so that they may hire nonunion replacements or break support for the union by soliciting workers to abandon their strike and return to work. In short, "[t]he right to strike has been turned on its head and essentially turned into an employer weapon."[3] As a result, unions strike much less frequently, which gives a misleading sense of labor-management harmony.

This Article examines the pivotal role that an employer's right to hire permanent striker replacements plays in adjusting the balance of power between workers and employers. It traces the evolution of this employer right through three basic legal paradigms: combination, conspiracy and concert, and examines a proposed additional paradigm: cartelization. The intended value of this framework is to provide a broad empirical foundation for reaching informed judgments about the best means of adjusting the power relationship between employers and workers with regard to the pivotal issue of striker replacements.

II. The Zero-Sum Equation: A Worker's Right to Strike and an Employer's Right to Hire Permanent Striker Replacements

The right to strike is vital to 10.5 million private sector workers who are represented by unions[4] and to many of the 6.4 million

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[2] For a good discussion of striker replacements and collective bargaining, see Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. Ill. L. Rev. 547 (1990).

[3] Robert L. Rose, *Caterpillar's Success in Ending Strike May Curtail Unions' Use of Walkouts*, Wall St. J., Apr. 20, 1992, at A3 (quoting Greg Tarpinian).

[4] *See* Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, *in* The State of the Unions 15 (George Strauss et al. eds., 1991). Generally, these employees are covered under the National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151–187 (1988) ("NLRA"). Certain private sector transportation employees are covered by the Railway Labor Act, 45 U.S.C. §§ 151–188 (1988) ("RLA"). Employees under both statutes are granted the right to engage in a work stoppage. *See* 29 U.S.C. § 163 (1988); 45 U.S.C. § 152 (1988).

public sector workers represented by unions.[5] For American workers, the right to strike emanates from the National Labor Relations Act ("NLRA"), which established a national policy for private sector collective bargaining.[6] The right to strike reflected Congress's belief that the nation's economic welfare required distributing wealth and economic power more evenly among workers and employers.[7]

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[5] Chaison & Rose, *supra* note 4, at 15. Public sector employees are covered by a patchwork of collective bargaining acts. The Federal Labor Relations Authority administers federal collective bargaining regulations. Civil Service Reform Act, 5 U.S.C. §§ 7101–7135 (1988). However, these employees do not have the right to strike. *Id.* § 7116(b)(7). Instead, the Federal Service Impasses Panel is empowered to settle impasses that develop. *Id.* § 7119. Postal workers are provided separate collective bargaining rights under the Postal Reorganization Act of 1970 and have interest arbitration in place of the right to strike. 39 U.S.C. § 1206 (1988).

For a recent compilation of state statutes that confer some form of collective bargaining rights on public employees (e.g., teachers, police officers, firefighters, municipal employees), including the express right to strike, see B.V.H. Schneider, *Public-Sector Labor Legislation—An Evolutionary Analysis*, *in* PUBLIC-SECTOR BARGAINING 189, 191 n.4 (2d ed., Benjamin Aaron et al. eds., 1988).

[6] 29 U.S.C. § 151 (1988). The NLRA states: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption. . . ." *Id.*

[7] *Id.* The findings and policy section of the NLRA reflects the redistributive aim of the legislation:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate [form] substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.

During the debate leading to the passage of the Act, congressional sentiment concerning the inequality of power between employers and workers was sometimes bitter:

> [W]hat about national trade associations—they can bargain collectively among themselves. Nobody steps in and says they cannot organize. Nobody stepped in when they came down to write the codes of the National Industrial Recovery Act, and said to them that they had no right to organize and bring all their tradesmen down, their representatives of their organizations, to fix prices and take care of their own interests, and in these codes exploit workers. No indeed! Antitrust acts did not apply to them. The antitrust laws were invoked only to enjoin workers from striking on the grounds that they were interfering with the free flow of interstate commerce. . . .
>
> Nobody raised a finger against that, but when labor comes in and says that all we want is the right to go to a booth in a factory and, with no interference by an employer, with no interference by our foreman, write down on a piece of paper whether we want a union of our choosing, whether we want a company union, whether we want no union, that is a different matter. A great cry goes up that we are oppressing employers.

79 CONG. REC. 9684 (1935) (remarks of Rep. Connery).

Thus, the NLRA fostered collective bargaining based upon legal equality of bargaining power.[8] A central tenet of this policy was to limit government interference in a worker's right to strike.[9]

Congress regarded the right to strike partly as a right of economic liberty for workers,[10] but more as an inducement for employers to mutually adjust differences with labor through collective negotiations.[11] The United States Supreme Court[12] and the National Labor Relations Board ("NLRB")[13] subsequently recognized the

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[8] Senator Wagner, the sponsor of the NLRA, envisioned collective bargaining as an appropriate process for the adjustment of workplace disputes between employers and employees. Thus he stated:

> While the bill explicitly states the right of employees to organize, their unification will prove of little value if it is to be used solely for Saturday night dances and Sunday afternoon picnics. Therefore, while the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representatives of his employees, because of the difficulty of setting forth this matter precisely in statutory language, such a duty is clearly implicit in the bill. . . .
>
> All collective bargaining is simply a means to an end. That end is not the mere exchange of pleasantries between employer and employees, but rather the making of agreements which will stabilize employment conditions and set fair working standards.

National Labor Relations Board: Hearings on S. 1958 Before the Comm. on Education and Labor, United States Senate, 74th Cong., 1st Sess. 43 (1935) (statement of Sen. Wagner).

[9] *See* 29 U.S.C. § 163 (1988).

[10] *See* 79 CONG. REC. 9730 (1935) (statement of Rep. Connery). Representative Connery, manager of the Wagner Act bill in the House, stated his opposition to an amendment to limit the right to strike:

> Mr. Chairman, this is another amendment . . . that would hamstring this bill. It would take the heart right out of it and kill the bill. It is another way of interfering with labor's right to strike, which is not a right that comes from Congress, but is a divine right which comes from the Almighty God.

Id.

[11] *See To Create a National Labor Board: Hearings on S. 2926 Before the Comm. on Education and Labor, United States Senate*, 73d Cong., 2d Sess. 10–11 (1934) (statement of Sen. Wagner). Senator Wagner stated:

> It has been urged that this bill places a premium on discord by declaring that none of its provisions shall impair the right to strike. On the contrary, nothing would do more to alienate employee cooperation and to promote unrest than a law which did not make it clear that employees could refrain from working if that should become their only redress. But this bill will prevent strikes by the only feasible and just method; that is, by insuring fair treatment to all parties and by establishing a powerful and trustworthy agency for the settlement of disputes.

Id.

[12] *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 234 (1963) (integrity of strike weapon remaining constant); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 488–89 (1960) (exercise of right to strike is part of labor system under the NLRA); UAW v. O'Brien, 339 U.S. 454, 457 (1958) (Congress has recognized and protected the right to strike).

[13] *See* Eads Transfer, Inc. v. Teamsters Local 378, 138 L.R.R.M. (BNA) 1168, 1170

centrality of this right to strike. Even when Congress restricted some strike rights in the Taft-Hartley Act of 1947,[14] the right to conduct a primary strike (where workers strike their employer) remained intact.[15] Senator Robert Taft reflected the integrity of the right to strike when he stated: "We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."[16]

Unlike a worker's right to strike, Congress did not establish an employer's right to hire permanent striker replacements. Instead, the Supreme Court established an employer's right to hire permanent replacements in the 1938 case of *NLRB v. Mackay Radio & Telegraph Co.*[17] In *Mackay Radio,* the Court held that the telegraph company discriminated against five union leaders when it refused to re-hire them after the strike settlement.[18] The Court then determined that employers had the right to hire permanent striker replacements, although that issue was not even before the Court.[19] Thus, one finds the foundation of an employer's right to hire permanent striker replacements in the dicta of a case decided over fifty years ago.

The unions and their members perceive the hiring of permanent striker replacements as an impairment of their inherent right to strike.[20] In contrast, employers perceive such hirings as a right vital to remaining globally competitive.[21] One may formulate the worker's right to strike and the employer's right to hire permanent replacement workers as a zero-sum equation: an expansion of one right results in a reciprocal contraction of the other. It necessarily

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(1991); Gaywood Mfg. Co. v. Textile Workers Local 677, 136 L.R.R.M. (BNA) 1032, 1036 (1990); Oregon Steel Mills, Inc. v. Steelworkers, 136 L.R.R.M. (BNA) 1269, 1270 (1990); Toledo (5) Auto/Truck Plaza, Inc. v. Hotel & Restaurant Employees Local 84, 136 L.R.R.M. (BNA) 1157, 1158 (1990).

[14] *See* 29 U.S.C. § 151(b) (1988).

[15] *See* 29 U.S.C. § 163 (1988).

[16] 93 CONG. REC. 3835 (1947) (statement of Sen. Taft).

[17] 304 U.S. 333, 345–46 (1937). For a full discussion of *Mackay Radio,* see *supra* notes 202–17 and accompanying text.

[18] 304 U.S. at 337.

[19] *Id.* at 345–46.

[20] Stephen Franklin & David Young, *Beyond UAW's Loss, A Setback for Ailing Labor,* CHI. TRIB., Apr. 19, 1992, § C, at 1; David Moberg, *Local Strike, National Stake,* N.Y. TIMES, Apr. 10, 1992, at A37; Robert L. Rose & Gregory A. Patterson, *Caterpillar Inc. Threatens to Replace UAW Strikers,* WALL ST. J., Apr. 2, 1992, at A3; *For UAW, 'A Question of Survival,'* CHI. TRIB., Apr. 3, 1992, § C, at 1.

[21] Tim Ferguson, *Tales of the Cat and GM, Joined by a Union,* WALL ST. J., Apr. 14, 1992, at A19; *Review and Outlook: The UAW Meets Reality,* WALL ST. J., Apr. 16, 1992, at A24.

follows, therefore, that an employer's right to hire permanent striker replacements may be found only in the context of the worker's right to strike.

III. The Public Policy Significance of Permanent Striker Replacements: An Overview

The right to strike retained its vitality following passage of the Taft-Hartley Act, as hundreds of major strikes occurred after 1947.[22] Starting in 1982, however, the number of major strikes dropped precipitously and has remained historically low.[23] This drop occurred shortly after President Ronald Reagan fired and permanently replaced 11,301 members of the Professional Air Traffic Controllers Organization ("PATCO") while they were engaged in an unlawful strike.[24] Since then, large or nationally prominent employers have hired or have threatened to hire permanent replacements for strikers. These employers include Caterpillar;[25] Eastern Airlines;[26] United Airlines;[27] Continental Airlines;[28] Trans World Airlines;[29] International Paper;[30] Greyhound;[31] Geo. A. Hormel;[32] Ravenswood Aluminum;[33] New York Daily News;[34] Chicago

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[22] Bureau of Labor Statistics, U.S. Dep't of Labor, Compensation and Working Conditions (Mar. 1992).

[23] *See id.*

[24] *See* Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 Indus. & Lab. Rel. Rev. 167, 178–79 (1984).

[25] *See* Philip Dine, *Job Seekers Besiege Caterpillar; Strikers Resist Urge to Give Up*, St. Louis Post-Dispatch, Apr. 8, 1992, at 10A; Gregory A. Patterson & Robert L. Rose, *Labor Makes a Stand in Fight for Its Future at Caterpillar Inc.*, Wall St. J., Apr. 7, 1992, at A1; Robert L. Rose, *Thousands Respond to Caterpillar Ads to Replace Striking Workers in Illinois*, Wall St. J., Apr. 8, 1992, at A3.

[26] *See* Air Line Pilots Ass'n v. Eastern Air Lines, 869 F.2d 1518, 1519 (D.C. Cir. 1989).

[27] *See* Air Line Pilots Ass'n v. United Air Lines, Inc., 802 F.2d 886, 890 (7th Cir. 1986).

[28] *See* Air Line Pilots Ass'n v. O'Neill, 111 S. Ct. 1127, 1130 (1991).

[29] *See* TWA v. Independent Fed'n of Flight Attendants, 489 U.S. 426, 429 (1989).

[30] *See* Adrienne M. Birecree, *Capital Restructuring and Labour Relations: The International Paper Company Strike*, 1 Int'l Contributions Lab. Stud. 59, 71 (1991).

[31] *See President of Striking Union Criticizes Greyhound for Seeking Bankruptcy Protection*, Daily Lab. Rep. (BNA) No. 109, at A-14 (June 6, 1990).

[32] *See generally* Hardy Green, On Strike at Hormel: The Struggle for a Democratic Labor Movement (1990); Dave Hage & Paul Klauda, No Retreat, No Surrender: Labor's War at Hormel (1989).

[33] *See Special Report: Anatomy of a Corporate Campaign*, 46 Union Lab. Rep. (BNA) No. 18, at 144 (May 7, 1992).

[34] *See Permanent Replacement Workers Called Key Issue as Daily News Strike Continues*, Daily Lab. Rep. (BNA) No. 210, at A-13 (Oct. 30, 1990).

Tribune;[35] Major League Baseball;[36] and the National Football League.[37]

The harsh positions taken by these companies suggest that the PATCO strike encouraged private sector employers to get tough with striking unions by hiring or threatening to hire permanent replacements for the striking workers. Because striking is related to a union's bargaining power, it is important to determine if striker replacement policy is affecting the ability of union members to strike, while also implicating other policy concerns.

Hiring permanent striker replacements implicates a web of public policy issues. At the center of the web, such hiring heightens labor-management confrontation, sometimes to fever pitch.[38] Although this employment practice is legal, it tends to prolong strikes, which is inconsistent with the national labor policy favoring peaceful settlement of workplace disputes.[39] Even without strikes, the actual or implied threat to hire permanent striker replacements has a chilling effect on bargaining by upsetting the balance of power between workers and employers.[40] Moreover, this practice has a spreading effect. Large employers communicate a "me-too" response to smaller employers: first, by reducing labor costs in their industry, and thereby forcing smaller employers to compete by

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[35] *See* Chicago Tribune Co. v. Graphic Communications Union, Local 7, 138 L.R.R.M. (BNA) 1041, 1043 (1991).

[36] *See* Jerome Holtzman, *Umps' Strike Is Almost at an End*, CHI. SUN-TIMES, May 20, 1979, at 120.

[37] *See* Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (Aug. 1988).

[38] *See* Robert L. Rose & Alex Kotlowitz, *Back to Bickering*, WALL ST. J., Nov. 23, 1992, at A1.

[39] 29 U.S.C. § 171 (1988). The NLRA states: "It is the policy of the United States that sound and stable industrial peace and the advancement of the general welfare . . . of the Nation . . . can most satisfactorily be secured by the *settlement of issues* between employers and employees through the processes of conference and collective bargaining. . . ." *Id.* (emphasis added).

[40] *Prohibiting Permanent Replacements: Hearing on H.R. 5 Before the Subcomm. of the Comm. on Public Works and Transp., House of Representatives*, 102d Cong., 1st Sess. 2 (1991) [hereinafter *Public Works Committee*] (statement of Rep. Oberstar). Representative Oberstar stated:

> We all lost in strikes, but principles were important. People were willing to lose income, to experience depravation [sic] and hardship for a principle. Certain rights, benefits, hours of work, vacation time, and health benefits were important enough to lay your economic condition on the line. Eventually it would be negotiated out and both parties would go back to work, but the [striker] replacement concept throws the whole balance of labor-management relations into a cock pen. Collective bargaining is meaningless if one side can dismiss the other.

Id.

reducing their labor costs; and second, by making a profitable example of employing striker replacements. Early evidence supports the spreading-influence thesis. In 1985, 31 percent of employers stated that they would consider hiring permanent striker replacements.[41] By 1992, this number rose to 48 percent.[42]

Further out in the web, the hiring of permanent striker replacements implicates national income policies. The basic rationale for hiring permanent replacements is to substitute cheaper for more expensive labor. Employers who exploit labor market competition by hiring permanent striker replacements effectively bid down wages and benefits. Competitor firms must match the aggressive labor cost-cutting of firms hiring permanent replacements, or become uncompetitive in their markets. Meanwhile, workers must be willing to work for less wages and benefits, or not work at all. There is also evidence to suggest that reduced strike activity corresponds to a drop in employee purchasing power.

For the period 1966–1979, an average of 314 strikes occurred each year.[43] During that same period, inflation increased a total of 141.2 percent,[44] while total compensation under collective bargaining agreements increased a total of 154.9 percent.[45] These data indicate that collective bargaining agreements moderately improved the purchasing power of organized workers, as total compensation outpaced inflation.

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[41] U.S. GOV'T ACCOUNTING OFFICE, LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970s AND 1980s (GAO/HRD-91-2) (1991), tbl. II.1, at 13.

[42] Rose, *supra* note 3, at A3.

[43] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COMPENSATION AND WORKING CONDITIONS (Mar. 1992), tbl. D-1, at 135. The table counts only those work stoppages involving 1,000 or more workers.

[44] *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CPI DETAILED REPORT (Jan. 1992), tbl. 24, at 81. This statistic is arrived at by inserting CPI data into a formula that compounds annual increases from the beginning of 1966 through the end of 1979. Thus: (76.7 − 31.8) ÷ (31.8 × 100).

[45] *Average Changes in Compensation (Wage and Benefit) Rates Under Collective Bargaining Settlements Covering 5,000 Workers or More, 1966–91*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COMPENSATION AND WORKING CONDITIONS (Mar. 1992), tbl. B-23, at 123. These data are for all industries and are computed on the annual rate of changes over the life of the contract for settlements reached in each year. Annual increases compound and therefore are not additive. For example, in 1966 compensation increased 4.1%. In 1967, a 5.1% increase *compounded* the 4.1% increase a year earlier. Thus: 4.1 ÷ (.051 x 4.1) + 5.1 = 9.41. This means that the compound growth of CBA compensation for 1966–1967 was 9.41%, not the mere sum of 5.1% + 4.1%. This process was iterated for the period 1966–1979.

From 1980–1991, however, an average of only 76 strikes occurred per year.[46] Meanwhile, total compensation for workers under collective bargaining agreements failed to keep pace with inflation. Total compensation increased a total of 52.8 percent,[47] while inflation grew at a rate of 77.2 percent.[48]

The erosion of inflation-adjusted compensation under collective bargaining agreements can be attributed to several factors, including: labor organizing laws biased toward employers;[49] declining union membership;[50] and an increasing supply of nonunion labor.[51] The decline in strike activity is another factor, particularly because the decline was accompanied by an increasing number of employers invoking the permanent replacement strategy.[52] Consequently, the replacement strategy has curtailed union strike activity; because strikes and the threat of strikes are essential to maintain a union's bargaining power in contract negotiations, the increased use of replacement strategy has resulted in a decline of union bargaining power.

At the outer edge of the web, the hiring of permanent striker replacements threatens the maintenance of law and order. On a large scale, the East St. Louis race riot of 1917 offers a chilling

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[46] *See* STATISTICS, *supra* note 43, at 135.

[47] *See* CPI REPORT, *supra* note 44, at 81.

[48] *See Compensation Rates*, *supra* note 45, at 123.

[49] *See* PAUL WEILER, GOVERNING THE WORKPLACE 106–07 (1990); Paul Weiler, *Promises to Keep: Securing Workers' Right to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1775–76 (1983).

[50] *See* Michael A. Curme et al., *Union Membership and Contract Coverage in the United States, 1983–1988*, 44 INDUS. & LAB. REL. REV. 5, 7–10 (1990); Peter Linneman et al., *Evaluating the Evidence on Union Employment and Wages*, 44 INDUS. & LAB. REL. REV. 34, 35–39 (1990); Steven G. Allen, *Declining Unionization in Construction: The Facts and the Reasons*, 41 INDUS. & LAB. REL. REV. 343, 344–45 (1988); William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950–1980*, 38 INDUS. & LAB. REL. REV. 323, 325–27 (1985).

The most recent data by the U.S. Census Bureau show the decline of union density. From 1983 to 1989, unionized employment in mining dropped from 23.1% to 19.7%; in construction, from 29.4% to 22.6%; in transportation and public utilities, from 46.2% to 34.1%; in wholesale and retail trade, from 9.8% to 7.0%; in finance, from 4.1% to 3.1%; and in services, from 9.6% to 7.0%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991 (111th ed. 1991), tbl. 697, at 524.

[51] There is extensive research literature showing that unionized workers are better compensated than similar, unrepresented workers. *See* Dickens & Leonard, *supra* note 50, at 328–30; Linneman et al., *supra* note 50, at 40–42; *see also generally* H. GREGG LEWIS, UNION-RELATIVE WAGE EFFECTS: A SURVEY (1986); Richard Edwards & Paul Swaim, *Union-Nonunion Earnings Differentials and the Decline of Private Sector Unionism*, 76 AM. ECON. REV. 97 (1986).

[52] *See supra* notes 23–37 and accompanying text.

illustration. In 1917, a virtually all-white workforce struck local steel and metal manufacturers in East St. Louis, Illinois, who responded by importing 10,000 black laborers from the South to use as striker replacements.[53] As a consequence, one of the bloodiest race riots in U.S. history occurred.[54] Although the East St. Louis riots are a distant memory, recent strikes involving permanent replacements have been marked by extreme tension and occasional violence.[55]

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[53] A recent summary of events recalled:

> In July 1917, riots sparked partly by the migration of black laborers from the South claimed the lives of 48 people. . . .
>
> Earlier that year, some 10,000 blacks had poured into East St. Louis from Southern states after factory owners said they needed workers to fill positions of striking white employees in the city's booming metal, chemical and agricultural products industries.
>
> They moved into slums and accepted lower wages than white workers, heightening racial tensions to the point that Gov. Frank O. Lowden sent in troops to maintain order for weeks.

Before L.A., East St. Louis Had Race Riot of the Century, CHAMPAIGN-URBANA NEWS GAZETTE, May 5, 1992, at A-8.

A contemporaneous account of the riots offers this chilling account:

> Thousands of persons were in the mob. The rioting is a renewal of race troubles that occurred here a month ago, following the importation of large numbers of negro laborers from the South. . . . Every hospital on the east side is filled with blacks who are so severely injured that many will probably die. . . .

Race Rioters Fire East St. Louis and Shoot and Hang Many Negroes; Dead Estimated at from 20 to 75, N.Y. TIMES, July 3, 1917, at 1.

[54] As recalled in one news account:

> One section of the mob gathered around a lone negro on Fourth Street near Broadway. A rope was thrown around his neck and he was hoisted up a telephone pole, but the rope broke. Men and women shouted gleefully as the negro fell into the gutter, while half a dozen men riddled his body with bullets. Negroes were lying in the street every few feet in some places.

Race Rioters, *supra* note 53, at 1.

[55] During the Hormel strike, for example, 800 National Guardsmen were posted to maintain law and order. *Hormel Strikers Close Plant Again*, N.Y. TIMES, Feb. 1, 1986, at 54. As soon as they were withdrawn, strikers barricaded all entrances to Hormel's main plant by double-lining all streets leading to the plant with parked cars. *Id.* This precipitated "mob rule" according to the local sheriff. *Id.* Later, a rally for strikers ended in violence, with eight police officers hospitalized after being pelted with chunks of asphalt and sprayed with chemical irritants. *Violence Erupts at Rally for Meatpackers Union*, N.Y. TIMES, Apr. 12, 1986, at 6.

In the Daily News strike eight delivery trucks were destroyed by fire bombs, and 60 trucks and 10 buses were damaged within the first five days of the strike. *See Permanent Replacement Workers Called Key Issue*, *supra* note 34, at A-14.

Capturing the tension of imminent violence in the UAW-Caterpillar strike, a reporter who witnessed picketing in Peoria noted:

> Strikers and security guards—dubbed 'rent-a-thugs' by workers—glare at each other across the gates as soldiers once did in divided Germany. . . .
>
> In almost pleading terms, Peoria's newspaper, the Journal Star, told readers in an editorial, "Peoria is already losing, and losing big. . . . And so a fearful

Given the simmering grievances between various racial and ethnic groups in the United States, it is conceivable that a strike involving the hiring of permanent replacements could spark serious disorder.[56] In short, where labor market competition is the governing rationale for hiring permanent replacements, volatile race and class issues may mix with more narrow issues of labor-management relations and collective bargaining. Even in more typical situations not charged by class or race issues, the hiring of striker replacements rends the social fabric of affected communities.[57]

During the 1980s, the number of strikes in the United States dropped to a historical low. An increasing number of large companies either hired or threatened to hire permanent replacements for striking workers. This emerging striker replacement policy not only threatens the right to strike, but also has serious repercussions

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> and frustrated community waits and watches for the play to go on. . . . Meanwhile we ask again . . . for peace. Violence may vent frustration but will accomplish nothing."

Philip Dine, *On Labor: Bitter Feelings on Labor War Engulf Peoria*, ST. LOUIS POST-DISPATCH, Apr. 10, 1992, at 12D.

[56] The intermixing of race and employment issues is illustrated by the aftermath of the 1992 Los Angeles riots. One reporter noted that

> [b]lacks have stopped Latino firms from cleaning up the mess if they do not employ enough blacks; one black activist told the *Los Angeles Times* that "Mexicans and Koreans do not deserve to work if we don't work." Latinos in the city nurse a long . . . grievance that public employment policy . . . is skewed toward blacks.

Return of the Nativist, ECONOMIST, June 27, 1992, at 25.

[57] *See* Dine, *supra* note 55, at 12D. Dine observed:

> [T]his normally tranquil community is in danger of being ripped apart.
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> . . .
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> That is evident, first of all, on the picket line, which pits neighbor against neighbor. Striking workers jeer employees who drive into the parking lot, reserving their most vociferous comments for fellow union members crossing the line.
>
> . . .
>
> As the 'turncoats' are identified, workers such as Tom Shults, a 28-year Caterpillar veteran, announce the names through a bullhorn. The tactic, meant to embarrass and intimidate, has proved powerful.

Id. See also Dine, *supra* note 25, at 10A. Striker Ed Heffer stated: "The feeling is it's a mean-spirited company that would force people to make a choice between your friends, your family and a job." Striker Irene Thompson crossed a long, angry picket line on April 6. A news account captured the moment:

> After arriving in a near-empty parking lot, the mother of two sat in her car a few minutes—then turned around and drove out. "I planned on going to work. . . . But after I crossed the line, I felt horrible. . . ." She concluded: "When someone tells you not to cross a picket line for 20 years, when you do it it does something to you."

Id.

upon the balance of power between labor and management, national income policies, and law and order.

IV. Combination, Conspiracy, Concert and Cartelization: The Four Paradigms of Striker Replacement Law

In seeking to fit roughly two hundred years of legal experience into a handful of paradigms, this Article aims for a wider historical perspective than previous efforts to generalize the central tendencies of striker replacement doctrines.[58] Because paradigms are models, they organize vast phenomena and data into concise descriptions on which others may articulate or specify further.[59] The use of paradigms also permits this Article to demonstrate the influence of English law in the formation and evolution of striker replacement policies in the United States.[60]

This discussion begins by observing that from the late 1700s until 1938, there was no American striker replacement policy per se. Various statutes and court decisions, however, implicitly created

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[58] For examples of previous striker replacement works, see Finkin, *supra* note 2, at 549–56; Joan Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 Temp. L.Q. 691 (1988); Douglas E. Ray, *The Changing Face of Labor-Management Confrontations in the Late '80's*, 30 B.C. L. Rev. 101 (1988); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984).

[59] *See* Thomas S. Kuhn, The Structure of Scientific Revolutions (1962). "In a science," Kuhn noted, ". . . a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions." *Id.* at 23. Kuhn compared the concept of paradigm to the practice of "normal science," which means "research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice." *Id.* at 10. Scientists, like judges and lawmakers, rarely if ever discover or articulate new paradigms; rather, they engage in the "mop-up work" that "a paradigm leaves to be done." *Id.* at 24. Thus, normal science is an enterprise "to force nature into the preformed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sets of phenomena; indeed, those that will not fit the box are often not seen at all." *Id.*

[60] This Article maintains that English legal influence was especially pronounced in the nineteenth century. *See infra* notes 142–62 and accompanying text. Most recently, the influence of English law has been virtually nil because American labor policy does not consciously borrow from Britain as it once did. It is noteworthy, however, that declining union bargaining power and diminished strike activity were closely congruent in Britain and the U.S. throughout the 1980s. Strike frequency in Britain plummeted much as it did in the U.S., except that the decline began in 1980 rather than 1982. In Britain there were 2,080 strikes in 1979, but only 1,330 strikes in 1980; 1,338 strikes in 1981; 1,528 strikes in 1982; 1,352 strikes in 1983; and 1,206 strikes in 1984. Roy Lewis, *The Role of the Law in Employment Relations*, *in* Labor Law in Britain 26 (Roy Lewis ed., 1986). These data are germane because they suggest that the issue of permanent striker replacements is not a uniquely American phenomenon.

such policy. There are two issues at the threshold of any striker replacement policy: whether worker organization (also called "combination") is lawful, and whether concerted activity by workers (and striking, in particular) is lawful.

Although striker replacement issues did not arise during the earliest period of American history, American law grappled with the first paradigm of combination. The combination paradigm developed in English law, but American courts were hesitant to accept it.[61] Nevertheless, the English combination paradigm influenced the formation of American labor policy. This first Anglo-American paradigm held that worker efforts to combine or organize for their mutual economic interests were unlawful. Early court decisions viewed worker combination as a restraint on trade; they regarded the public interest in setting wage rates through free labor market competition as supervening any interest workers had in determining their wages or piece rates.

The combination paradigm was eventually repudiated. For instance, in the 1842 case of *Commonwealth v. Hunt*, the Massachusetts Supreme Court recognized the legality of worker combination by citing as authority the parliamentary laws of 1824 and 1825 that delineated the boundaries of permissible and impermissible striker conduct.[62] The law took yet another turn, however, as federal and state decisions sharply limited the concerted activity of worker combinations, thereby rendering such combinations ineffective.

These latter decisions formed the second paradigm of conspiracy, which took a stringent view of striker rights and an expansive view of the right of employers to hire permanent replacements. It is difficult to say whether the new paradigm was the product of a new generation of judges or more aggressive union strategies for engaging in concerted activities.

It is essential to note that American unions during this period mimicked the conduct of English unions, particularly in their efforts to prevent striker replacements from working. They organized consumer boycotts of struck employers who hired replacement workers and they "blacklisted" scabs, or striker replacements. A striking union, for example, would attempt to prevent boardinghouses from putting up striker replacements through its blacklist. The law thus began to distinguish between lawful *objectives* of worker combination and lawful *means* for effectuating those objectives. Striker rights

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[61] *See* Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 826 (1925).

[62] 45 Mass. (4 Met.) 111 (1842).

were consequently infused with common law doctrines of criminal conspiracy.

The third paradigm, concert, is rooted in the 1935 NLRA. Although the Taft-Hartley Act and a series of Supreme Court decisions between 1938 and 1988 sharply curtailed the right to strike, this Article maintains that the concert paradigm is still intact. This paradigm is marked by the legislative repeal of common law principles undergirding the conspiracy paradigm. Contrary to the conspiracy paradigm, the concert paradigm legitimizes as a matter of public policy a union's use of an economic strike in furtherance of collective negotiations with an employer over wages, hours, and terms and conditions of employment. Oddly, however, this era also includes the *Mackay Radio* decision, which expressly states that an employer has the right to hire permanent replacements. This paradigm, therefore, creates a tension between workers and employers in the event of a strike.

The fourth paradigm, cartelization, is only in proposal form.[63] It is defined by the paradigm-breaking premise that an employer may hire only *temporary* striker replacements. This public policy would effectively limit the pool of replacement workers available to struck employers.

In the present debate over this proposal, organized labor takes the view that this measure would simply restore the status quo before the wrongly decided *Mackay Radio* decision and President Reagan's popularization of the permanent striker replacement strategy through the PATCO strike.[64] From a historical perspective, labor's view in this matter is unfounded. This Article suggests,

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[63] *See infra* notes 281–85 and accompanying text.

[64] *Preventing Replacement of Economic Strikers: Hearing Before the Subcomm. on Labor of the Comm. on Labor and Human Resources, United States Senate*, 101st Cong., 2d Sess. 39 (1990) [hereinafter *Labor Hearing*] (statements of Sen. Metzenbaum and Thomas Donahue). A portion of the exchange between Senator Howard Metzenbaum and Thomas Donahue, Secretary-Treasurer of the AFL-CIO, follows:

> Senator Metzenbaum: How do you account for the fact that the *Mackay* decision, made about 50 years ago, that for about 40 years there were no problems, and employers went along and did not bring in permanent replacements. Then, starting about 10 years ago, we found this new movement to bring in permanent replacements. . . .
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> . . .
>
> Mr. Donahue: I think there has been a sea change, Senator, in the whole climate of industrial relations in this country. I think the employers have been emboldened by President Reagan's action in the PATCO strike—there simply is no question in my mind about that.

Id.

nevertheless, that there is a sound public policy reason for breaking the concert paradigm in favor of cartelization:[65] the restoration of balance in bargaining power between workers and employers.

A. *The Paradigm of Combination*

In colonial America, many workers formed organizations to promote their economic interests.[66] Typically, these organizations were small cells formed on the basis of craft occupations.[67] Although collective bargaining between workers and employers did not exist, workers acted together to improve their wages.[68] The short supply of skilled labor in a growing land and economy favored workers who formed such combinations.[69] Although the colonies were subject to English laws, they formulated their own employment law through their legislatures and municipalities.[70] Courts consequently had available to them colonial statutes regulating wage rates and restraints on combination.[71]

Many of the earlier combination cases have sometimes been grouped under the category of conspiracy. It is not difficult to see

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[65] *See* discussion in Section IV-D.

[66] Excellent overviews of early American labor cases and strike activity involving these organizations appear in Witte, *supra* note 61, and Walter Nelles, Commonwealth v. Hunt, 32 COLUM. L. REV. 1128, app. at 1166–69 (1932).

[67] *See* David J. Saposs, *Colonial and Federal Beginnings (to 1827), in* 1 HISTORY OF LABOUR IN THE UNITED STATES 25, 108–18 (John R. Commons ed., 1918) (discussing the formation of groups of shoemakers and cordwainers, typographers, tailors, sailors and textile workers).

[68] *See id.* at 121. Saposs summarized the interchange between workers and employers:

> The early trade unions started out with individual bargaining. The present practice of asking for a conference with representatives of employers in order to agree upon terms collectively was not thought of until later. Not even conferences were held between the individual employers and the representatives of the men. They merely determined a scale of prices and pledged one another, as in the case of the shoemakers, 'not to work for any employer who did not give the wages, nor beside any journeyman who did not get the wages.' The journeymen very likely copied this method from their masters, who as merchants were accustomed to determine prices and pledge each other to abide by them.

Id.

[69] Richard Morris observed that

> the scarcity and high cost of labor . . . assured the workman of a higher standard of living than was obtainable by a person of similar employment in England or on the Continent. . . . The colonial workman commanded real wages which exceeded by from 30 to 100 per cent the wages of a contemporary English workman.

RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 44–45 (1981).

[70] *See, e.g., id.* at 17–18 (laws enacted to protect workers against unfair dismissal).

[71] *See id.* at 18–21.

how the classification of cases involving worker organizations may be unclear. For the purpose of this discussion, the author groups the following cases as falling under the combination paradigm.

The early American *Cordwainers* decision involved a strike and the legality of worker organization.[72] Although the facts and precise legal issues in the *Cordwainers* case are not recorded, there is this report of the judge's instructions to the jury: "A combination of workmen to raise their wages may be considered in a twofold point of view: one is to benefit themselves . . . the other to injure those who do not join their society. The rule of law condemns both."[73] The jury found the journeymen "guilty of a combination to raise wages."[74]

In *People v. Fisher,* journeymen shoe and bootmakers in Geneva, New York, agreed to make their products for not less than one dollar a pair.[75] Thomas Pennock, a journeyman shoemaker, contracted with Daniel Lum, a master shoemaker, to make ten pairs of boots for 75 cents a pair.[76] As a result, no boot or shoemaker who agreed to the one dollar minimum rate would work for Lum until he fired Pennock.[77] Lum eventually bent to this pressure and fired Pennock.[78]

In ruling that Fisher and his fellow trade unionists were properly charged with an indictable offense,[79] the court reasoned

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[72] Saposs, *supra* note 67, at 140.

[73] *Id.* at 140–41. *Compare* Commonwealth v. Carlise (Pa. 1821) Bright 36, *cited in* Witte, *supra* note 61, at 826, n.10 (involving *employers* who were charged with combining to depress wage rates for workers). The judge in that case stated that the law would view such a combination as illegal if employers sought to reduce wages "below what they would be, if there was no recurrence to artificial means by either side." *Id.*

[74] Saposs, *supra* note 67, at 141.

[75] 14 Wend. 9, 10 (1837). The journeymen were charged with "form[ing] and unit[ing] themselves into an unlawful club and combination. . . ." *Id.* They were also charged with "conspir[ing] . . . with other persons . . . to prevent any journeyman boot and shoemaker, in the Village of Geneva, from working his trade and occupation below certain rates and prices. . . ." *Id.* The journeymen's association promulgated a rule requiring that any member who worked below the proscribed rate would pay a $10 penalty to the association. *Id.* Compare Pattern Makers League v. NLRB, 473 U.S. 95 (1985), discussed *infra* notes 241–46 and accompanying text, where the union fined members crossing its picket line to work during a strike.

[76] *Fisher,* 14 Wend. at 10–11.

[77] *Id.* at 11.

[78] *Id.*

[79] Fisher was charged under New York's conspiracy laws, which provided: "If two or more persons shall conspire to either . . . commit any act injurious to . . . trade or commerce . . . they shall be deemed guilty of a misdemeanor." *Id.* at 14–15.

that the worker combination was itself unlawful and that the combination had employed unlawful means.[80] It concluded that the journeymen's association was "a monopoly of the most odious kind."[81] The court observed that if the journeymen were permitted to set their own wages, they would be regulating the prices of all manufactured goods, and thus the community would "be enormously taxed."[82] Applying a New York statute to the facts, the court concluded, "Such combinations would be productive of derangement and confusion, which certainly must be considered 'injurious to trade.'"[83] The combination was harmful first because, "[i]n the present case, an industrious man was driven out of employment by unlawful measures"[84] and second, because "an injury [was] done to the community, by diminishing the quantity of labor and of internal trade."[85]

The *Fisher* court reflected a strain of American judicial thought favoring unrestrained competition in labor markets.[86] Soon after *Fisher,* another court in an unreported decision found a combination of twenty tailors unlawful, sparking a mass protest.[87] Shortly thereafter, the combination paradigm retreated.[88]

At least one other factor contributed to the demise of the combination paradigm. In 1824, the English Parliament repealed its price-setting regulations for a wide range of crafts and occupations.[89] This revisionist legislation hastened the end of the combi-

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[80] *Id.* at 18.

[81] *Fisher,* 14 Wend. at 19.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 18.

[85] *Id.* at 19.

[86] *See Fisher,* 14 Wend. at 19. The *Fisher* court remarked:

> It is true, that no great danger is to be apprehended on account of the impracticability of such universal combinations. But if universally or even generally entered into, they would be prejudicial to trade and to the public; they are wrong in each particular case. The truth is, that industry requires no such means to support it. Competition is the life of trade.

Id.

[87] *See* Witte, *supra* note 61, at 827. After the verdict was announced, 27,000 workers rallied in the streets of New York City and burned the judge in effigy. *Id.*

[88] *Id.* Witte concluded that the unlawful combination theory undergirding cases such as *Fisher, Cordwainers,* and *Twenty Tailors* "was allowed to die by common consent. No leading case was required for its overthrow. America was poor soil for this transplanted doctrine, and it could not withstand the hearty blasts of Jacksonian democracy." *Id.*

[89] Act to Repeal the Laws Relative to the Combination of Workmen, 5 Geo. 4, ch. 95, § 1 (1824) (Eng.).

nation paradigm. Before the Act of 1824, English law prevented workers from "conspiring" to standardize prices for their services.[90] In repealing wage-regulating laws, the Act provided that

> Journeymen, Workmen, or other Persons who shall enter into any Combination to obtain an Advance, or to fix the Rate of Wages, or to lessen or alter the Hours or Duration of the Time of working, or to decrease the quantity of Work . . . shall not therefore be subject or liable to any Indictment or Prosecution for Conspiracy, or to any other Criminal Information or Punishment whatever, under the Common or Statute Law.[91]

This law was paradigm-breaking for two reasons. First, it legalized worker organization for the purpose of affecting wage rates and working conditions. Second, the law permitted workers "to induce another to depart from his Service before the End of the Time or Term for which he is hired, or to quit or return his Work before the same shall be finished, or . . . to refuse to enter into Work or Employment . . ." when it stated that such conduct "shall not therefore be subject or liable to any Indictment or Prosecution for Conspiracy, or to any other Criminal Information or Punishment whatever, under the Common or Statute Law."[92] The first two clauses permitted combinations to engage in concerted work stoppages (strikes), while the last clause legitimated striker efforts to prevent replacements from working.

The Act did not permit strikers absolute freedom to prevent striker replacements from taking their jobs. It outlawed striker conduct aimed at persuading replacements to stop working where "any Person by Violence to the Person or Property, by Threats or Intimidation, shall wilfully or maliciously force another" to stop working.[93] Thus, the law struck a balance between a striker's right to protect his work stoppage against labor market competition and an employer's right to continue operations during a strike. This

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[90] 5 Geo. 4, ch. 95, § 3 (1824). These laws included "Of the Fees of Craftsmen and The Price of Their Worke"; "Of Writches and Mason"; "The Price of Craftsmenne Work, of Meat and Drinke in Taverns"; "An Act for Regulating the Trade of Silk Throwing"; "An Act for Regulating the Journeymen Tailors Within the Weekly Bills of Mortality"; "An Act to Prevent Unlawful Combinations of Workmen Employed in the Woolen Manufactures, and for the Payment of Wages," and scores of others.

[91] 5 Geo. 4, ch. 95, § 2.

[92] *Id.*

[93] 5 Geo. 4, ch. 95, § 5.

balance permitted employers to utilize replacements but also permitted strikers to appeal to replacements not to work.

The paradigm break engendered by the Act was so apparent that Parliament repealed it a year later in the Act of 1825.[94] The repeal reflected Parliament's concern that legalization of worker combinations was "injurious to Trade and Commerce, [and] dangerous to the Tranquillity of the Country."[95] Although it continued to treat worker combinations as legal,[96] the Act broadened restrictions on striker conduct directed at replacements. It did so by prohibiting workers from forcing or attempting to force other workers to quit their labor by "Violence to the Person or Property, or by Threats or Intimidation, or by molesting or in any way obstructing another" from working.[97]

The paradigm break in English law was joined in American law only with the Massachusetts Supreme Court's decision in *Commonwealth v. Hunt*.[98] Although combination was not fully accepted by American courts, some cases do make mention of it. *Hunt*, however, marked the end of the combination paradigm by rejecting the legal premise that worker combinations were per se illegal.[99]

In *Hunt*, seven bootmakers were indicted for forming an illegal workers' combination that conspired to compel Isaac Wait, an employer, to discharge Jeremiah Horne, a nonunion bootmaker.[100] In reversing a guilty judgment of the municipal court,[101] the *Hunt* court carefully delineated the boundary between conspiracy, lawful combination and concerted activity. It noted that if the defendants had used physical force or fraud to compel Wait to fire Horn, "it would have been a different case."[102] But here the bootmakers had stopped short of coercion or compulsion, for "[i]t was the agreement

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[94] *See* Act to Repeal the Laws Relating to The Combination of Workmen, 6 Geo. 4, ch. 129, § 1 (1825) (Eng.).

[95] *Id.*

[96] *See* 6 Geo. 4, ch. 129, § 4. Section 4 provided:

> That this act shall not extend to subject any Persons to Punishment, who shall meet together for the sole Purpose of consulting upon and determining the Rate of Wages or Prices . . . or the Hours or the Time for which he or they shall work . . . or who shall enter into any Agreement, verbal or written, among themselves, for the Purpose of fixing the Rate of Wages. . . .

[97] 6 Geo. 4, ch. 129, § 3.

[98] 45 Mass. (4 Met.) 111 (1842).

[99] *See id.* at 129.

[100] *Id.* at 112–14.

[101] *Id.* at 136.

[102] *Id.* at 132.

not to work for him, by which they compelled Wait to decline employing Horne longer."[103]

In breaking the combination paradigm, the court reasoned that a trade combination would not be unlawful because workers could use this power for honorable purposes such as to help other workers in times of poverty or sickness, "or to raise their intellectual, moral and social condition; or to make improvement in their art. . . ."[104] In this case, the indictments failed because the bootmakers' agreement not to work for an employer who hired anyone who was not a member of a particular association[105] did not constitute an unlawful purpose, and the indictments "set forth no . . . illegal or criminal means to be adopted for the accomplishment of any purpose."[106]

A key passage reveals that the *Hunt* court was significantly influenced by Parliament's Act of 1824 in analyzing the bootmakers' combination:

> It does not aver a conspiracy or even an intention to raise wages; and it appears by the bill of exceptions, that the case was not put on the footing of a conspiracy to raise their wages. *Such an agreement, as set forth in this count, would be perfectly justifiable under the recent English statute, by which this subject is regulated.* St. 6 Geo. 4, ch. 129.[107]

The combination paradigm developed primarily in English law but also had some influence in the development of American law. American courts, which favored unrestrained competition in labor markets, were likely to find combinations unlawful. The paradigm break eventually came with the *Hunt* court, which rejected the notion that worker combinations were per se illegal.

B. *The Paradigm of Conspiracy*

The *Cordwainers* and *Fisher* courts found worker combination unlawful primarily as a restraint of trade. In the paradigm that followed, courts continued to be strongly and favorably influenced by free market arguments. But the respected *Hunt* court created a problem for later courts, because it recognized that worker orga-

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[103] *Hunt*, 45 Mass. (4 Met.) at 133.

[104] *Id.* at 129. However, "[i]f a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question," according to the court. *Id.* at 131.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 131–32 (emphasis added).

nizations were founded for a variety of purposes, including fraternity, philanthropy and education.[108] Outlawing worker combinations per se would raise problems in states where associational rights were protected. Accordingly, judicial restriction of worker organizations and their activities required a fundamentally different theoretical basis. The result was the conspiracy paradigm, in which common law principles of criminal conspiracy were applied to trade union activities, especially strikes.

In contrast to the combination paradigm, which viewed mere association of workers to advance collective interests as illegal, the conspiracy paradigm focused instead on the coordinated activities of those workers. Frequently, in decisions where courts found criminal or civil liability, courts evaluated the ends and means of coordinated worker activity by reference to general philosophical principles such as free market competition, economic liberty, freedom of association and freedom of contract. If the activities infringed upon any of these sacred principles, the means were considered to be an unlawful conspiracy.

It is essential to note that several English common law decisions strongly influenced the American courts that recognized the conspiracy paradigm.[109] These American courts also distilled principles of unlawful intimidation and molestation from parliamentary statutes and applied these principles to cases involving striker efforts to prevent replacements from working. The English decisions on which American courts based the conspiracy paradigm included *Regina v. Selsby,*[110] *Regina v. Rowlands,*[111] *Regina v. Duffield,*[112] and *Regina v. Bauld.*[113]

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[108] *See* 45 Mass. (4 Met.) at 129. Ironically, early trade unions grew out of fraternal labor organizations founded by workers *and* employers:

> Prior to and immediately after the Revolution workers and employers had cooperated on a number of issues, and had even formed mutual benefit societies 'for the laudable purpose of protecting such as their brethren as by sickness or accident may stand in need of assistance, and for the relief of widows, and orphans of those who die (reference omitted).'

1 PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 69 (1947).

[109] See *infra* notes 141–58 and accompanying text for a full discussion of these American decisions. The decisions also imported principles derived from parliamentary statutes and were especially influential from the 1860s to the 1880s because of the absence of federal labor and antitrust statutes.

[110] 5 Cox Cr. Cas. 495 (1851). *Reg. v. Selsby* was unreported after its decision in 1847 by Mr. Baron Rolfe at South Lancashire Spring Assizes. *Id.* at 495.

[111] 169 Eng. Rep. 540 (Q.B. 1851).

[112] 5 Cox Cr. Cas. 404 (1851), *aff'd sub nom.* Reg. v. Rowlands, 169 Eng. Rep. 540 (Q.B. 1851).

[113] 13 Cox Cr. Cas. 282 (1986).

Selsby is unique among these decisions for dismissing allegations that strikers were engaged in a conspiracy. A group of workers was indicted for attempting to induce other workers to quit their employment at a foundry by picketing outside the building and passing out pamphlets.[114] The workers took this action based on a pact to set wages with an employer and to establish a mutual benefit strike fund.[115] The court ruled in favor of the strikers, reasoning that if it was not unlawful for workers to make agreements to withhold work under certain circumstances, then it was also not unlawful for these workers to peaceably persuade others to do the same.[116] The crux of the court's reasoning was that the strikers had engaged in informational rather than coercive conduct; as such, their peaceable conduct was not illegal.[117]

Rowlands differed from *Selsby* because it upheld criminal conspiracy counts against strikers who attempted to prevent replacements from working. It is critical to note that the Act of 1825, which *narrowed* the scope of permissible striker conduct,[118] was pivotal in deciding these cases.[119] This point is essential because American courts working with the conspiracy theory cited *Rowlands* as authority and thereby incorporated elements of the 1825 statute and English courts' construction of that law.

In *Rowlands,* a group of workers faced twenty criminal counts of "conspiracy by molesting workmen to compel them to quit their employment" during a labor dispute at a manufacturer of tin pans.[120] In particular, Green, a union delegate, "had stated that the society [union] had £20,000 at their command, and that, if the [employers] discharged a man, because he was a member of their association, they could stop the supplies, and they would not have a single hand upon their works."[121] Trade unionist Peel carried a sign with inflammatory language decrying the harsh treatment by the employer and defending the workers' conduct as appropriate.[122]

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[114] *See Selsby*, 5 Cox. Cr. Cas. at 495–96.

[115] *See id.* at 496–97.

[116] *Id.* at 498.

[117] *Id.*

[118] For a discussion of this Act, see *supra* notes 94–97 and accompanying text.

[119] *See* Reg. v. Rowlands, 169 Eng. Rep. 540, 549 (Q.B. 1851); Reg. v. Duffield, 5 Cox. Cr. Cas. 404, 428 (1851), *aff'd sub nom.* Reg. v. Rowlands, 169 Eng. Rep. 540 (Q.B. 1851).

[120] 169 Eng. Rep. at 541.

[121] *Id.* at 551.

[122] *Id.*

A jury found the defendants guilty on all the conspiracy counts, and an appeal followed.[123] Counsel for Rowlands argued that the conspiracy indictment was defective because the Act of 1825 defined unlawful striker conduct too ambiguously.[124] Although the appeals court entered a *nolle prosequi* for Rowlands and Winters, it sustained the convictions of Peel, Green, Duffield, Woodnorth and Gaunt and sentenced them to three months in prison.[125]

The court's reasoning in sustaining Peel's and Green's conviction reflected the ambiguous framing of the 1825 Act. The court found that the statute permitted workers to act in concert for their mutual aid and benefit when it observed that "[t]he object of the Legislature was, that all masters and workmen should be left free in the conduct of their business. The masters were at liberty to give what rate of wages they liked, and to agree among themselves for what wages they would pay."[126] As for workers, they were "at liberty to agree among themselves for what wages they would work, and were not restricted in so doing by the circumstance that they were in the employ of one or other of the masters."[127] But the court was attracted to the conspiracy fragments in the statute, notwithstanding their vague delineation, when it focused on the provision pertaining to *means* to attain the lawful ends of worker combination:

> The intention of the Legislature was to make them quite free, but, seeing that intimidation might be used to carry out such agreement, it was enacted . . . that if any person should by violence, threats, intimidation, molesting or obstructing another, force, or endeavor to force, any workmen to depart from his employ, or prevent him from accepting employment . . . he should be liable to imprisonment. . . .[128]

Thus, the court viewed Green's threat to prevent replacements from working if a unionist were discharged on account of membership in the society as a threat "within the Act of Parliament."[129]

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[123] *Id.* at 543.

[124] *Id.* at 544. Counsel argued that "the counts proceed upon the words of the Act of Parliament—molesting, obstructing, by threats or intimidation; but it is submitted that they are all bad, as being too general." *Id.*

[125] 169 Eng. Rep. at 551.

[126] *Id.* at 551 n.(a).

[127] *Id.*

[128] *Id.*

[129] *Id.*

In the period following *Rowlands*, a public policy tug-of-war appeared to take place over the issue of a worker's right to prevent replacements from working for a struck employer. An 1859 Act of Parliament increased strikers' protection against replacements.[130] Those protections were later reinforced by the Trade Union Act of 1871.[131] In the same year, however, Parliament passed a conspiracy law that failed to immunize certain striker conduct from criminal prosecution.[132] The Criminal Conspiracy and Protection of Property Act of 1875 broadened this law considerably.[133] The 1875 law applied particularly to striker replacement scenarios. It protected replacements and employers wishing to hire replacements by criminalizing conduct undertaken "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing. . . ."[134]

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[130] *See* An Act to Repeal the Laws Relating to Workmen, 22 & 23 Vict., ch. 34, § 1 (1859) (Eng.). The Act broadened permissible striker conduct by providing:

> No Workman or other Person, whether actually in employment or not, shall, by reason merely of his entering into an Agreement with any Workman or Workmen . . . for the Purpose of fixing or endeavoring to fix the Rate of Wages or Remuneration at which they or any of them shall work, *or by reason merely of his endeavoring peaceably, and in a reasonable manner, and without Threat or Intimidation, direct or indirect, to persuade others to cease or abstain from Work* . . . shall be deemed or taken to be guilty of 'Molestation' or 'Obstruction' within the Meaning of the said Act. . . .

Id. (emphasis added). This language is significant because Parliament expressly limited the vague prohibition against molestation and obstruction in the Act of 1825. It did so by permitting peaceful and reasonable efforts by strikers to persuade, educate and inform replacements about the effect of their strike-breaking conduct. *See id.*

[131] 34 & 35 Vict., ch. 31, § 1 (1871) (Eng.). Section 3 of the Act provided that "[t]he purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." *Id.* § 3. It is critical to note that § 4 of the Act deprived all courts of jurisdiction to "entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any" of certain kinds of agreements. *Id.* § 4. This section covered "any agreement between members of a trade union as such, concerning the conditions on which any members . . . shall or shall not sell their goods, transact business, employ or be employed," and consequently, legitimated work stoppages that might otherwise be attacked as restraints of trade. *Id.* Moreover, the Act provided for "the application of the funds of a trade union to provide benefits to members," thereby sanctioning a trade union's payment of strike benefits. *Id.* Another provision permitted "[a]ny agreement made between one trade union and another," thereby sanctioning unions to coordinate strike activity. *Id.*

[132] An Act to Amend the Criminal Law Relating to Violence, Threats, and Molestation, 34 & 35 Vict., ch. 32, § 1 (1871) (Eng.).

[133] 38 & 39 Vict., ch. 86, § 3 (1875) (Eng.). This law defined and criminalized acts of intimidation and annoyance that frequently occasioned strikes. *See id.*

[134] 38 & 39 Vict., ch. 86, § 7. The law imposed criminal liability on anyone who:

> 1. Uses violence to or intimidates such other person or his wife or children, or injures property; or,

Soon after the 1875 law was enacted, Baron Huddleston decided the case of *Regina v. Bauld* against James Bauld and eight fellow unionists who sought hourly wages instead of piece-rates.[135] The workers were charged under the law with watching and besetting two employers, Easton and Anderson, to discourage replacements from crossing their picket line.[136] In *Bauld*, counsel for the unionists argued: "As to the charge of 'watching' and 'besetting' your Lordship is aware that there are two views which may be taken. If it were done merely for the purpose of persuading the men to quit their employment it would not be illegal."[137] Baron Huddleston rejected this argument, observing that the law permitted only "watching or attending near a place for the purpose of obtaining or communicating information. . . ."[138] Taking a restrictive view of striker conduct toward replacements, Huddleston explained that this provision only allowed strikers to monitor who was working for the struck employer.[139] As to picketing for the purpose of discouraging replacements from working, Huddleston took this dim view:

> Now on this rests the great question of picketing. No doubt the men are in the habit of taking an erroneous view of what they may be permitted to do in the shape of picketing, and it is a very serious question no doubt. They have no right to watch or beset the house or other place where a person resides, or works . . . for the purpose of compelling any person to abstain from doing that which he has a legal right to do.[140]

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2. Persistently follows such other person about from place to place; or,
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road. . . .

Id.

[135] 13 Cox Cr. Cas. 282, 283 (1876).

[136] *Id.* at 282–83.

[137] *Id.* at 283.

[138] *Id.*

[139] *See id.* at 284. Huddleston's rationale recognized the union's legitimate need to prevent its members from fraudulently drawing striker benefit funds while at the same time working: "Attending . . . means no doubt that occasionally you may . . . find some who would, so to speak, be 'traitors' to you who, while getting their share of the money raised for the support of those on strike, go and work as well and thus get money from both sides." *Id.* at 291.

[140] *Bauld*, 13 Cox Cr. Cas. at 284.

Bauld's immediate effect was to reestablish the conspiracy paradigm begun in *Rowlands*. More importantly, this line of decisions fed directly into the conspiracy paradigm emerging in the United States.

Three state court decisions in the 1880s reflected the emerging influence of the English conspiracy paradigm: *State v. Stewart,*[141] *Crump v. Commonwealth*[142] and *State v. Glidden.*[143] A stonecutters' union in *State v. Stewart* attempted to prevent an employer from employing nonunion cutters, and was subsequently indicted for conspiring "to prevent, hinder and deter by violence, threats and intimidation, the Ryegate Granite-Works . . . from retaining and taking into its employment James O'Rourke, William Goodfellow and other persons" who were not unionists.[144] In ruling to uphold the indictment, the court drew heavily from the *Selsby* and *Rowlands* line of authority:

> The principle upon which the cases, English and American, proceed is that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and, if two or more combine to coerce his choice in this behalf, it is a criminal conspiracy.[145]

It is critical to note that the indictment that was upheld by the court was modeled after language appearing in the Act of 1825 and first construed by the *Rowlands* court.[146]

Crump v. Commonwealth involved a union's effort to prevent a Virginia printing company, Baughman Brothers, from employing nonunion labor.[147] The Virginia court convicted W.F. Crump, acting as an agent for the Richmond typographers' union, of conspiring to use force, violence, threats or intimidation against Baughman Brothers.[148] The Virginia Supreme Court affirmed his conviction.[149]

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[141] 9 A. 559 (Vt. 1887).

[142] 6 S.E. 620 (Va. 1888).

[143] 8 A. 890 (Conn. 1888).

[144] 9 A. at 560.

[145] *Id.* at 568.

[146] *See id.* at 569–70. The *Stewart* court directly acknowledged the link between Vermont's conspiracy laws and the English conspiracy paradigm: "[T]he pleader has supplemented the charge of unlawful conspiracy by an allegation of the means by which it is to be accomplished, by *violence, threats,* and *intimidation.* Our statute . . . has prescribed a punishment for using threats or intimidation to prevent a person from accepting or continuing an employment in a mill." *Id.* at 569 (emphasis in original). In this passage, the court cited *Rowlands* and the Act of 1825 expressly as authority. *See id.*

[147] 6 S.E. 620, 623 (Va. 1888).

[148] *Id.*

[149] *Id.* at 630.

The union had followed the company's delivery wagon, obtained a list of its customers and had "used every means, short of actual force to compel them to cease dealing with Baughman Brothers."[150] Although they did not strike Baughman Brothers, the union sought to prevent the company from employing nonunion labor by publishing pamphlets stating: "Watch out for Baughman Brothers' '*rats*,' and find out where they board. It is dangerous for honest men to board in the same house with these creatures."[151]

Citing *Rowlands*, the *Crump* court declared: "Every attempt, by force, threat, or intimidation, to deter or control an employer in the determination of whom he will employ . . . is an act of wrong and oppression. . . ."[152] The court distinguished this case from *Hunt* by reasoning that *Hunt* involved "a club or combination of journeymen bootmakers simply to better their own condition, and it had no aim or means of aggression upon the business or rights of others."[153] This case differed, however, because here the union used force, defined in terms of "coercion by fear, threat, or intimation of loss."[154] It is noteworthy that *Crump*'s common law standard was similar to the "violence, threat, and intimidation" model in the Parliament's Act of 1825.[155]

In the 1886 case of *State v. Glidden*, a New Haven typographers' union demanded that a local newspaper sign a labor agreement under threat of an organized boycott.[156] Due to the threatened boycott, the state of Connecticut indicted the typographers under the state's conspiracy law.[157] Applying the 1878 Act to the union's conduct, the court concluded:

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[150] *Id.*

[151] *Id.*

[152] 6 S.E. at 628.

[153] *Id.* at 629.

[154] *Id.*

[155] Act to Repeal the Laws Relating to the Combination of Workmen, 6 Geo. 4, ch. 129, § 3 (1825) (Eng.).

[156] 8 A. 890, 893 (Conn. 1887).

[157] The Connecticut statute provided that

> every person who shall threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him, shall . . . be liable. . . .

1878 Conn. Pub. Acts 92. This legislation was enacted only four years after Parliament similarly prohibited "compel[ling] any other person to abstain from doing . . . any act which such person has a legal right to do or abstain from doing"; and "us[ing] violence to . . . intimidate [any] other person or his wife or children, or . . . injur[ing] property; or . . . persistently follow[ing] other such person about from place to place; . . . or follow[ing] such

> They propose to threaten and use means (the boycott) to intimidate the Carrington Publishing Company to compel it, against its will, to abstain from doing an act (to keep in its employ the workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants, and such persons as they should name) which it had a legal right to abstain from doing. There can be but one answer to the question. The acts proposed are clearly prohibited by the statute.[158]

During the 1870s and 1880s, there was a strong revival of trade unionism. The striker replacement issue was important in the period, as indicated by this early U.S. Department of Labor report:

> Strikes against the numerous wage reductions which were introduced in 1873 were particularly prevalent among shoe workers, cigar makers, and textile and iron workers. The numerous strikes of textile workers in Fall River against periodic wage cuts were uniformly unsuccessful.[159]

These strikes failed because employers hired French-Canadian immigrants to fill vacancies and because strikers signed agreements under force not to join any labor organization as the condition of reemployment.[160]

In the 1880s and 1890s, strike activity rose very sharply.[161] Moreover, strikes became increasingly violent. The year 1877, for example, was remembered as the year of the great railroad strikes, because these were marked by extreme violence. For the first time in the United States, federal troops were called during peacetime to suppress strikers.[162]

During this period, the conspiracy paradigm widened as courts extended their power to restrict a range of union activities. Increasingly, the issue in legal controversies involving striker replacements was the legitimacy of court action in blocking the concerted activities

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other person with two or more other persons in a disorderly manner. . . ." Conspiracy and Protection Act, 1875, 38 & 39 Vict., ch. 86, § 3 (1875) (Eng.).

[158] 8 A. at 891–92.

[159] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 651, STRIKES IN THE UNITED STATES, 1880–1936, at 19 (1938).

[160] *Id.*

[161] *Id.* at 21. The number of strikes in the United States was fairly constant between 1881 and 1884 (477 in 1881; 476 in 1882; 506 in 1883; and 485 in 1884). Thereafter, strike activity soared (695 in 1885; 1,572 in 1886; 1,503 in 1887; 946 in 1888; 1,111 in 1889; 1,897 in 1890; 1,786 in 1891; 1,359 in 1892; 1,375 in 1893; 1,404 in 1894; 1,255 in 1895; 1,066 in 1896; 1,110 in 1897; 1,098 in 1898; and 1,838 in 1899). *Id.*

[162] *Id.* at 19.

of strikers. Also during this period, the direct linkage between English and American decisions with respect to striker replacement issues weakened. English and American courts, however, did take a consistently hostile view of strikes and striker conduct aimed at excluding replacements from taking union jobs.

Four major American and English decisions illustrate this congruent treatment: In re *Debs*,[163] *J. Lyons & Sons v. Wilkins*,[164] *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*[165] and *American Steel Foundries v. Tri-City Central Trade Council*.[166] In the 1895 case of In re *Debs*, the United States Supreme Court validated government suppression of a strike by issuance of injunctions and imprisonment of strike leaders.[167] In May 1894, the American Railway Union struck Pullman Palace Car Co.[168] To make its strike more effective, the union widened the strike to twenty-two railroad companies.[169] The union induced many of the railway employees to leave their jobs and prevented the companies from hiring replacements.[170] The strike had an immense effect on the nation's grain and livestock trade, transport of freight and mail, and passenger service.[171] As a consequence, four union officers, including Eugene V. Debs, were enjoined by a federal court in July from issuing orders and taking measures to effectuate the general strike further.[172] Upon the officers' failure to comply with the injunction,

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[163] 158 U.S. 564 (1895).

[164] [1896] 1 Ch. 811.

[165] 1901 App. Cas. 426 (P.C.) (appeal taken from Eng.).

[166] 257 U.S. 184 (1921).

[167] 158 U.S. at 599–600.

[168] *Id.* at 566.

[169] *Id.* at 566–67. A comprehensive account of the Pullman strike appears in U.S. STRIKE COMM'N, REPORT ON THE CHICAGO STRIKE OF JUNE—JULY, 1894 (1895) [hereinafter STRIKE COMM'N REPORT].

[170] 158 U.S. at 567. The complaint against the union also averred that union officers "proceeded by collecting together in large numbers, by threats, intimidation, force and violence at the station grounds, yards and right of way of said railroad companies . . . to prevent said companies from employing other persons to fill the vacancies aforesaid; to compel others still employees . . . to quit such employment. . . ." *Id.* at 568. The U.S. Strike Commission painted a more vivid picture of this situation when it wrote:

> The strike occurred on May 11, and from that time until the soldiers went to Pullman, about July 4, three hundred strikers were placed about the company's property, professedly to guard it from destruction or interference. This guarding of property in strikes is, as a rule, a mere pretense. Too often the real object of guards is to prevent newcomers from taking strikers' places, by persuasion, often to be followed, if ineffectual, by intimidation and violence.

STRIKE COMM'N REPORT, *supra* note 169, at xxxviii.

[171] *In re* Debs, 158 U.S. at 569–70.

[172] *Id.* at 570. A contemporaneous account by a writer sympathetic to organized labor conveys the sweeping and unusual nature of the injunction:

the four were found guilty of contempt and sentenced to three to six months in jail.[173] The Supreme Court ultimately denied Debs' habeas corpus petition, holding that the government had lawful authority to interfere with obstructions of interstate commerce, and that the federal district court had equity jurisdiction to issue an injunction in this matter.[174]

As in *Debs,* English courts also made use of injunctions to end strikes. *J. Lyons & Sons v. Wilkins* is notable because the court specifically enjoined a union's efforts to discourage replacements from working through a strike.[175] Like American courts issuing labor injunctions in the same period, the *Lyons* court issued a restraining order against the union, prohibiting it from "maliciously inducing, or conspiring to induce, persons not to enter into the employment of [Lyons]."[176] The conspiracy paradigm was strongly reinforced in

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> On the seventh day of the strike, the Federal Military power was supreme in Chicago, and in Illinois, and in all of the States where the boycott had been applied. The situation was one of gravity, not unlike that of martial law. The regular army took control of things despite the urgent remonstrances of State authorities. The Federal Judges, Wood and Grosscup, issued in Chicago the most sweeping injunction ever issued by a Federal Court in a time of peace, one which the first named of these men described as a 'Gatling Gun on paper.' It absolutely enjoined the officers of the American Railway Union . . . from the further prosecution of the boycott, and even from 'persuading' any person to take part in it. . . . It was a veritable drag-net, and was designed to terminate at once and by force the application of that peaceful, proper, and lawful agency, the boycott. . . . Under the interpretation given to it by the Federal District Attorney, thousands of boycotters might be seized every day by deputy marshals empowered to make arbitrary arrests, arraigned before the bar, and summarily punished for contempt of court.

JOHN SWINTON, STRIKING FOR LIFE 92–93 (1894).

[173] *In re* Debs, 158 U.S. at 572–73.

[174] *Id.* at 599–600.

[175] [1896] 1 Ch. 811, 835–36. The *Lyons* court granted an interlocutory injunction against officers of the Amalgamated Trade Society of Fancy Leather Workers, who were engaged in a strike against a manufacturer of portmanteaus and leather bags. *Id.* at 811, 836. During the strike, the union's executive committee picketed the workplace with signs reading:

> Dear Sir—
>
> You are hereby requested to abstain from taking work from Messrs. J. Lyons & Sons, Redcross Street, E.C., pending a dispute. Members are also requested to use their influence to keep non-society men, stitchers and machinists, &c., from applying for work until the dispute is settled.

Id. at 812. The record shows that the "pickets accosted persons entering and leaving the plaintiffs' premises, tried to persuade them not to work for the plaintiffs, and gave them some cards." *Id.*

[176] *Id.* at 818. The court adopted the reasoning of Lord Esher, who, in Temperton v. Russell, [1893] 1 Q.B. 715, viewed the efforts of a union to induce workers to quit while still under contract as malicious "[i]f the persuasion be used for the indirect purpose of injuring

the famous English case of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, which was factually similar to the Pullman strike in *Debs*.[177]

The Clayton Act, passed in 1914, seemingly weakened the conspiracy paradigm in America.[178] The Act amended the antitrust laws to allow federal courts to enjoin parties from conduct that will cause loss.[179] Congress, however, exempts labor organizations from the Clayton Act in carrying out "legitimate objects."[180] The Clayton Act therefore appeared to prevent courts from applying antitrust theories to enjoin strikes.[181]

In the 1921 case of *Duplex v. Deering*, the United States Supreme Court concluded that the legislative intent behind the labor exemption was unclear.[182] The Court held:

> As to § 6, it seems to us its principal importance . . . is for what it does *not* authorize. . . . The section assumes the

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the [employer], or of benefitting the [union] at the expense of the [employer]." *Lyons*, 1 Ch. at 815 (quoting *Temperton*, 1 Q.B. at 728).

In sustaining the injunction, the *Lyons* court concluded that "Parliament has not yet conferred upon trade unions the power to coerce people, and to prevent them from working for whomsoever they like. . . ." 1 Ch. at 822. The court clearly understood the implications of enjoining strikers against persuading replacements not to work when it noted: "Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken, and unless other people can be prevented from taking the place of the strikers." *Id.* The decision continued:

> That is the pinch of the case in trade disputes; and until Parliament confers on trade unions the power of saying to other people, "You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon," trade unions exceed their power when they try to compel people not to work except on the terms fixed by the unions.

Id. at 823.

[177] 1901 App. Cas. 426 (P.C.) (appeal taken from Eng.). This decision by the Privy Council held that a union was suable and liable for damages resulting from illegal strike conduct. *Id.* at 445.

[178] Anti-Trust (Clayton) Act, ch. 323, 38 Stat. 731 (1914) (codified as amended in scattered sections of 15 U.S.C.).

[179] Clayton Act § 16, 15 U.S.C. § 26 (1988).

[180] *Id.* § 6, 15 U.S.C. § 17.

[181] *Id.* The Act provided:

> [T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purpose of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

[182] 254 U.S. 443, 469 (1921).

> normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade.[183]

The chief consequence of this construction was to permit courts to continue enjoining the concerted activities of unions, including strikes and prevention of replacements from working.

In the same year that the Court decided *Duplex,* it also decided *American Steel Foundries v. Tri-City Central Trade Council,* a prototypical case of strikers preventing replacements from taking their work.[184] In that case, a federation of trade unions called a strike against a large foundry after the employer had laid off 1,600 unionized workers and reopened by hiring a mix of 300 nonunion and union-affiliated workers.[185] All but two men showed up for work after the Council posted its strike notice, so the Council established pickets along the streets and at the rail depot leading to the factory to effectuate the strike and deter replacements from working.[186] These pickets were confrontational and occasionally violent.[187] As a result, the federal district court enjoined the Council

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[183] *Id.*

[184] 257 U.S. 184 (1921).

[185] *Id.* at 195–96. After declaring the strike, the Council displayed a notice announcing the strike at the plant and called on all laborers to stay away from the plant so that workers might win a wage increase. *Id.* at 196.

[186] *Id.* at 195–96.

[187] *See id.* at 197–98. The Court recounted the intensity and disorder occasioned by the strike:

> Complainant's employees testified that, just as the picketing began, they were warned by some of the defendants that they would be hurt if they did not quit. The master mechanic of the plant, Hall, testified that Lamb, one of the defendants, the national representative of the Machinist's Union at St. Louis, . . . handed him the circular of the Trades Council, and told him, "We don't like the way you have treated our boys down here, and we just came down to raise a little hell."
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> . . .
>
> There was an assault on April 30th, in which one Hafner, an employee, was attacked by three of the picketers. . . . On May 13th, another assault occurred, which developed into a mob, and two witnesses for complainant swore positively that the President of the Trades Council, Galloway, was engaged in this disturbance and was throwing bricks.

Id. at 197.

from conspiring to prevent the employer from hiring striker replacements.[188]

At issue was whether the Clayton Act, which sharply curtailed federal court jurisdiction to issue injunctions in matters arising out of employment disputes, applied to the district court's order restraining individual picketers as well as the Council.[189] The Court concluded that the injunction was applied properly to this dispute because picket conduct was not peaceful or lawful.[190] The employer argued that because the Clayton Act did not expressly immunize unions or union councils from injunctions, the Council was fully subject to the district court's injunction power.[191] This meant, argued the employer, that the district court could enjoin not only unlawful conduct, but also the Council's peaceful efforts to persuade replacements from working. The Court concluded, however, that nothing "requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment."[192] The Court thus ruled that "the restraint from

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[188] *American Steel Foundries*, 257 U.S. at 193. The Council argued that the court order was overbroad in prohibiting strikers from picketing and persuading strike breakers to picket. *See id.* at 195.

[189] *Id.* at 201. The Clayton Act set forth jurisdictional limits on courts adjudicating labor disputes:

> [N]o restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees . . . or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law. . . .

Clayton Act ch. 323, 38 Stat. 731, § 20 (1914).

[190] *American Steel Foundries*, 257 U.S. at 203–04. The Court noted that "[i]t is clear that Congress wished to forbid the use of federal courts of their equity arm to prevent peaceable persuasion by employees . . . in promotion of their side of the dispute and to secure them against judicial restraint in obtaining or communicating information. . . ." *Id.* at 203. But where "those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court's duty which the terms of § 20 do not modify, so to limit what the propagandists do as to time, manner, and place. . . ." *Id.* at 203–04. In this case, the injunction was proper because "three or four groups of picketers were made up of from four to twelve in a group. . . . They began early and continued . . . during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation." *Id.* at 204–05.

[191] *Id.* at 208–09.

[192] *Id.* at 212.

persuasion included within the injunction of the District Court was improper, and in that regard the decree must be fulfilled."[193]

The conspiracy paradigm focused on the coordinated activities of workers. If an activity intruded upon a general principle such as free market competition or freedom of contract, it was found to be an unlawful conspiracy. Although English courts generally recognized the right to strike, there was debate as to whether striking workers could prevent replacements from working for a struck employer. The English cases, which took a very restrictive view of striker conduct toward replacements, had a profound effect on the conspiracy paradigm in the United States. Increasingly, American courts used their power to enjoin potentially violent or unlawful union activity directed at preventing employers' use of striker replacements.

C. *The Paradigm of Concert*

The American paradigm of concert was established with the enactment of the NLRA in 1935. Section 7 of the Act embodies the essence of concert in recognizing three core rights: the right of workers to organize, to bargain collectively and to act in concert for their mutual aid or benefit.[194] "Concert" has two meanings: the right of workers to act collectively in their economic interest, and a relationship of mutual engagement between workers and employers resulting in a written contract covering pay and working conditions.[195]

The NLRA has two broad public policy aims: creation of economic demand by increasing the purchasing power of workers and legitimation of workers' economic and political rights.[196] Regrettably, the Act does not explicitly address an employer's right to hire permanent striker replacements. Section 13 of the NLRA provides that the Act shall not be construed so as to diminish the right to strike.[197] On the surface, this suggests that employers cannot hire

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[193] *Id.* at 213.

[194] NLRA, ch. 372, 49 Stat. 449, § 7 (1935) (codified as amended at 29 U.S.C. § 157 (1988)). Section 157 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . ." 29 U.S.C. § 157 (1988).

[195] For a discussion of the legislative history of the NLRA, see *supra* notes 6–11 and accompanying text.

[196] 29 U.S.C. § 151 (1988). For a discussion of the public policy rationale of the NLRA, see *supra* notes 7–8 and accompanying text.

[197] NLRA, ch. 372 Stat. 449, § 13 (1935) (codified as amended at 29 U.S.C. § 163 (1988)).

permanent replacements, because this practice clearly diminishes the right to strike. On closer inspection, however, nothing in the statute or its legislative history repealed common law rulings that had the effect of permitting employers to hire permanent replacements.

The statute's ambiguous treatment of the right to hire striker replacements was further confused by the Supreme Court's construction of that right in the 1938 case of *NLRB v. Mackay Radio & Telegraph Co.*[198] and, more recently, in *Belknap, Inc. v. Hale,*[199] *Pattern Makers League v. NLRB*[200] and *TWA v. Independent Federation of Flight Attendants.*[201] In *Mackay Radio,* a union of telegraphers struck their employer after negotiations failed to produce a new labor agreement. The employer hired replacements to work through the strike.[202] Realizing that its strike had failed, the union agreed to return to work three days later.[203] The employer, however, stated that it would not displace eleven men who had filled in as replacement workers during the short strike.[204] A supervisor of the employer hence offered to reinstate all but eleven of the returning strikers.[205] The employer required these eleven strikers to reapply for their positions, indicating they would be reinstated as positions opened.[206] In the end, the employer denied reinstatement only to five strikers who just happened to be the most active union members.[207]

The Court affirmed the National Labor Relations Board's finding that the employer committed an unfair labor practice by not reinstating the five strikers: "The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the [company's] officials discriminated against the latter on account of their union activities. . . ."[208] The *Mackay Radio* Court thus affirmed the concert paradigm when it determined that employers cannot delay rein-

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[198] 304 U.S. 333 (1938).
[199] 463 U.S. 491 (1983).
[200] 473 U.S. 95 (1985).
[201] 489 U.S. 426 (1989).
[202] *Mackay Radio,* 304 U.S. at 337.
[203] *Id.*
[204] *Id.* at 338.
[205] *Id.*
[206] *Id.*
[207] *Mackay Radio,* 304 U.S. at 339.
[208] *Id.* at 347.

statement of returning strikers if their motive is to punish such workers for their strike activity.

The *Mackay Radio* Court did not, however, confine its analysis to the issues presented in the litigation. In dictum the Court ruled on the issue whether an employer may legally hire permanent striker replacements.[209] Notably, the union did not challenge this practice, focusing instead on only the employer's discrimination against five union activists.[210] Furthermore, although the Board found that the employer effectively discharged these activists, it did not address the issue of permanent replacements.[211] But in dictum that further confused the concert paradigm, the Court stated that it was not "an unfair labor practice to replace striking employees with others in an effort to carry on the business."[212] In a key passage, the Court failed to give effect to § 13 of the NLRA, which provided that "[n]othing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."[213] Although it cited this section, the Court concluded that "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers."[214]

The Court then expressly stated a principle permitting employers to hire *permanent* replacement workers, while failing to cite any statutory or common law support for the proposition. In so doing, the Court observed that an employer

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[209] *See id.* at 345–46.

[210] *See id.* at 342–43.

[211] *See Mackay Radio*, 304 U.S. at 339. The Court, in restating the complaints initially filed against the company, noted that the company was alleged to have "discharged . . . the five men who had not been reinstated to their positions for the reason that they had joined and assisted the labor organization" and thus the company's conduct "was a discrimination in respect of their hire and tenure of employment. . . ." *Id.* at 339. Thus, the gravamen of the complaint was employment discrimination motivated by anti-union animus (based specifically on § 8(3) of the NLRA), and not the employer's general practice of hiring permanent replacement workers during a strike. *See id.*

[212] *Id.* at 345.

[213] *Id.* (quoting NLRA, ch. 372, 49 Stat. 449, § 13 (1935)). What is remarkable about the Court's glossing over § 13 is that the practice of hiring *permanent* replacement workers can have a very chilling effect on a worker's right to strike. To a striking worker who is placed on a reinstatement list following the strike and who is not permitted to return to work until his replacement leaves (the result of the permanent replacement rule in *Mackay Radio*), there is no real protection under the Act. The permanent replacement rule leaves a returning striker an employee without work indefinitely. Thus, innumerable workers may forego their "protected" right to strike.

[214] *Id.*

> is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the company] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.[215]

The NLRB subsequently tempered the *Mackay Radio* doctrine by distinguishing economic strikers and unfair labor practice strikers, and denying employers the right to hire permanent replacements for the latter group.[216] This policy followed *NLRB v. Fleetwood Trailer Co.*, in which the Supreme Court moderated its *Mackay Radio* doctrine by providing that strikers are entitled to reinstatement when their jobs become available (such as, for example, by expansion of the employer's workforce).[217]

In *Belknap, Inc. v. Hale,* 400 warehouse and maintenance workers at a building materials company struck their employer.[218] Belknap granted a unilateral wage increase to any union worker who remained on the job and also placed ads seeking permanent replacements.[219] It hired a large number of these applicants, while at the same time the union filed a complaint alleging that Belknap's unilateral pay increase was an unfair labor practice.[220] The Board's regional director issued a complaint and, in an effort to prod Belknap to settle the strike, stated that he would withdraw charges if a strike settlement were reached.[221] The union and the company then negotiated a strike settlement that provided in part for a phased-in return of striking workers, who would displace the permanent replacements.[222] Twelve of the permanent replacements who were discharged as a result of the strike settlement sued Belknap under Kentucky law, alleging breach of contract and misrepresentation.[223] They sought $250,000 in compensatory damages and an equal amount in punitive damages.[224]

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[215] *Mackay Radio*, 304 U.S. at 345–46.
[216] *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 n.5 (1967).
[217] *Id.* at 381.
[218] 463 U.S. 491, 493 (1983).
[219] *Id.*
[220] *Id.* at 494–95.
[221] *Id.* at 495–96.
[222] *Id.* at 496.
[223] *Belknap*, 463 U.S. at 496–97.
[224] *Id.* at 497.

In *Belknap*, the Supreme Court affirmed the Kentucky Court of Appeals' holding that replacement workers' misrepresentation and breach of contract claims were not preempted by the NLRA.[225] Belknap argued that the replacement workers' claims were preempted on two grounds. First, the workers' state claims involved conduct that is protected or prohibited by the NLRA.[226] Second, the state claims were related to conduct that Congress purposely left unregulated.[227] The latter argument was based on the theory that when Congress enacted the NLRA it intended self-help to be available to the parties in labor-management conflicts without state interference.[228]

The *Belknap* majority dismissed the first argument, concluding that it was merely an alternative way of stating that the employer is not accountable for its assurances of permanent employment or for any other misrepresentations in obtaining permanent replacements.[229] The Court continued: "We do not think that the normal contractual rights and other usual legal interests of the replacements can be so easily disposed of by broad-brush assertions that no legal rights may accrue to [the permanent replacements] during a strike because the federal law has privileged the 'permanent' hiring of replacements and encourages settlement."[230]

Concerning the second argument, Belknap argued that to allow the case to continue would disturb "the delicate balance of forces established by the federal law."[231] The company further urged that permitting these costly suits against employers for making agreements for the return of striking workers would contravene federal policy in favor of settling labor disputes.[232] The Court, however, was unpersuaded by this argument and concluded that

> when an employer attempts to exercise this very privilege by promising the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law

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[225] *Id.* at 512.

[226] *Id.* at 498 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)).

[227] *Id.* at 499 (citing Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976)).

[228] *Belknap*, 463 U.S. at 499.

[229] *Id.* at 501.

[230] *Id.*

[231] *Id.* at 499.

[232] *Id.*

> and its otherwise actionable misrepresentations may not be pursued.[233]

Addressing the issue of how employers would exercise their *Mackay Radio* right to hire permanent replacements without incurring liability for breach of contract or misrepresentation in the event of a strike settlement, the Court suggested that employers simply make their offers of employment to replacement workers "conditional."[234]

This approach, however, is simplistic. Employers would likely attract fewer "conditional" permanent replacements (a contradiction in terms) than permanent replacements. As a result of *Belknap*, a struck employer is likely to work through a strike by offering replacement workers genuine permanence, thereby avoiding *Belknap* causes of action by not settling strikes, or by reaching settlement agreements in which strikers do not displace their permanent replacements. Justice Blackmun's concurrence in *Belknap* was sensitive to this prospect:

> The Court's conditional promise achieves only one thing: it permits an employer, during settlement negotiations with the union, to threaten to retain permanent employees in preference to returning strikers despite the fact that the employer has not promised to do so. The naked interest in making such a threat, silently endorsed in the Court's opinion, could not be less legitimate under the NLRA. From the employer's point of view, one benefit of offering strike replacements permanent employment is that strikers become fearful that they will lose their jobs. But it is clear that creating this fear, which discourages union membership and concerted activities, is a deleterious side-effect of, rather than a legitimate business justification for, the power to hire permanent strike replacements.[235]

Justice Brennan's dissent in *Belknap* clearly illustrated how the Court's holding undermines settled labor law by hypothesizing a fairly common scenario where an employer commits an unfair labor practice at the time it hires permanent striker replacements.[236] Be-

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[233] *Belknap*, 463 U.S at 500.

[234] *See id.* at 501–02.

[235] *Id.* at 516 (Blackmun, J., concurring in the judgment).

[236] *See id.* at 528 (Brennan, J., dissenting). The dissent noted that "[t]he strike involved in this case . . . arguably was converted into an unfair labor practice strike almost immediately after it started. If the strike was converted into an unfair labor practice strike, the striking employees were entitled to reinstatement irrespective of [Belknap's] decision to hire permanent replacements." *Id.* (Brennan, J., dissenting).

cause strikers who are victims of unfair labor practices cannot be displaced by permanent replacements, the Board would be required by law to reinstate the strikers at the conclusion of their work stoppage.[237] In this situation, therefore, an employer would be subject to directly conflicting federal law (requiring reinstatement of ULP strikers) and state law (creating liability for an employer's dismissal of permanent replacements).[238] The only way for an employer to avoid this conflict would be to retain redundant sets of employees, surely an economic burden. The dissent concluded: "This sort of conflicting regulation is intolerable."[239] Moreover, it found that the majority decision weakened the concert paradigm when it stated that the "Court's change in the law of permanency weakens the rights of strikers and undermines the protections afforded those rights by the Act."[240]

In the 1985 Supreme Court case of *Pattern Makers League v. NLRB*, a union conducted an economic strike against an employer association for several months.[241] When its membership voted to reject a proposed contract settlement, eleven members tendered their resignations from the union and returned to work.[242] Union bylaws, however, prohibited members from resigning during a strike.[243] Consequently, the union fined these crossovers (union members who return to work) an amount equal to their wages for the period they crossed the union's picket line.[244] The employer association, not the crossovers, filed a charge with the Board that the union's fines violated the crossovers' rights under § 8(b)(1)(A) of the NLRA.[245] The Board upheld these charges, and the Court's decision in *Pattern Makers League* affirmed the Seventh Circuit's enforcement of the Board's ruling.[246]

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[237] *See id.* (Brennan, J., dissenting). The majority observed that "had the strike been adjudicated an unfair labor practice strike Belknap would have been required to reinstate the strikers. . . ." 463 U.S. at 511.

[238] *See Belknap*, 463 U.S. at 528 (Brennan, J., dissenting).

[239] *Id.* at 530 (Brennan, J., dissenting).

[240] *Id.* at 540 (Brennan, J., dissenting).

[241] 473 U.S. 95, 97 (1984).

[242] *Id.* at 95.

[243] *Id.* at 96.

[244] *Id.* at 98.

[245] *Id.* Section 8(b)(1)(A) states that "it shall be an unfair labor practice for a labor organization . . . to restrain or coerce employees in the exercise of the rights guaranteed in section (7). . . ." Importantly, the section continues: "Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." 29 U.S.C. § 158(b)(1)(A) (1988).

[246] *Pattern Makers League*, 473 U.S. at 100.

Writing for the majority, Justice Powell reasoned that § 8(b)(1)(A)'s prohibition against union restraint or coercion is purely an extension of § 7's guarantee of an employee's right to refrain from union activities:

> When employee members of a union refuse to support a strike (whether or not a rule prohibits returning to work during a strike), they are refraining from 'concerted activity.' Therefore, imposing fines on these employees for returning to work 'restrain[s]' the exercise of their section 7 rights.[247]

The Court sweepingly concluded that "fining employees to enforce compliance with *any* union rule or policy would violate the Act."[248] It based its reasoning partly on Taft-Hartley's amendment of § 7, creating an employee right to refrain from union membership,[249] and also on an amendment outlawing closed shops in favor of voluntary unionism.[250] This decision weakens the concert paradigm by denying unions the power to deter their own members from breaking ranks during a strike.

The dissent in *Pattern Makers League* reasoned that § 8(b)(1)(A) expressly allowed *limited* union discipline of its members, yet the majority's ruling proscribed *all* discipline, "no matter how limited and no matter how reasonable."[251] In dissent, Justice Blackmun premised his reasoning on the centrality of union discipline to effective collective bargaining: "Unless internal rules can be enforced, the union's status as bargaining representative will be eroded, and the rights of members to act collectively will be jeopardized."[252] This reasoning acknowledges that a union's use of its

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[247] *Id.* at 101.

[248] *Id.* (emphasis added). The broad scope of this conclusion is emphasized because the majority opinion appeared to give little or no effect to § 8(b)(1)(A)'s exemption of internal union discipline.

[249] *See id.* at 102–03. Section 7 of the NLRA provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all [concerted] activities. . . ." NLRA § 7, 29 U.S.C. § 157 (1988). The majority reasoned that at the time Taft-Hartley was enacted "union constitutional provisions restricting the right to resign were uncommon, if not unknown. Therefore, allowing unions to 'extend an employee's membership obligation through restrictions on resignations' would 'expan[d] the definition of internal action beyond the contours envisioned by the Taft-Hartley Congress." *See Pattern Makers League*, 473 U.S. at 103. In short, the majority reasoned that any restriction on employee resignation from unions was an unlawful end-run around the § 7 provision for employee freedom from union affiliation and activity.

[250] *Id.* at 106.

[251] *Id.* at 117–18 (Blackmun, J., dissenting).

[252] *Id.* at 118 (Blackmun, J., dissenting).

ultimate economic weapon, the strike, necessarily imposes a high, short-term cost on members that the union hopes will be recouped in the long term. In such a situation, high-minded notions of group solidarity are likely to be undercut by the real and immediate need felt by individuals to return to work:[253]

> Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the 'pact' (citation omitted).[254]

The dissent attacked the majority's failure to take into account the legislative history behind § 8(b)(1)(A), in which the Taft-Hartley Congress expressly distinguished permissible and impermissible forms of union discipline of members. It noted that Congress openly dismissed the Court's interpretation of sections 7 and 8(b)(1)(A).[255] Specifically, "[t]he House regarded the 'right to refrain' of section 7(a) as the right not to join in union activity, making it illegal for 'representatives and their partisans and adherents to harass or abuse employees into joining labor organizations.'"[256] Furthermore, observed the dissent, "[t]here is no suggestion that the House considered the right to refrain to include the right to abandon an agreed-upon undertaking at will. . . ."[257] In analyzing the Pattern Makers' restriction against member resignation, the dissent also noted: "The rule stands for the proposition that to become a union member one must be willing to incur a certain obligation upon which others may rely. . . ."[258]

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[255] *See* Michael H. LeRoy, *Striker Replacements and Strike Crossovers: An Empirical Public Policy Analysis of the NLRB's No-Presumption Policy*, 33 ARIZ. L. REV. 291, 320–24 (1991) (unionized workers who are most likely to cross their union's picket line during a strike are likely to do so for economic reasons, not because they are unhappy with union representation).

[254] *Pattern Makers League*, 473 U.S. at 118–19 (Blackmun, J., dissenting) (quoting NLRB v. Textile Workers, 409 U.S. 213, 221 (1972)).

[255] *Id.* at 121 (Blackmun, J., dissenting).

[256] *Id.* at 122 (Blackmun, J., dissenting) (quoting H.R. REP. No. 245, 80th Cong., 1st Sess. 30 (1947)).

[257] *Id.* (Blackmun, J., dissenting).

[258] *Pattern Makers League*, 473 U.S. at 120–21 (Blackmun, J., dissenting). Importantly, the dissent noted that the bylaws did not operate in the coercive fashion of the abolished closed shop: "An employee who violates the rule does not risk losing his job, and the union cannot

In *TWA v. Independent Federation of Flight Attendants*, a union of flight attendants went on strike two years after their contract had expired and negotiations failed to produce an agreement.[259] The airline stated its intention to work through the strike by hiring permanent replacements for striking attendants.[260] Recognizing the possibility that it could not hire a sufficient number of permanent replacement workers immediately, the airline determined that it would have to induce striking flight attendants to abandon their strike and return to work.[261] It offered crossovers their choice of domiciles and flights left open by strikers and promised to preserve these choices by denying strikers their former domiciles and routes at the conclusion of the strike.[262]

TWA's strategy thus added a new wrinkle to the practice of hiring permanent striker replacements by inducing striking workers to join the ranks of the replacements. The airline created a zero-sum exchange among workers in which those who exercised their right not to strike gained at the expense of those who did. This resulted in "offensive" crossing over by junior strikers who sought an immediate and permanent reward for abandoning the strike and "defensive" crossing over by senior strikers who sought to protect the domiciles and routes they acquired only by accumulating substantial seniority.[263]

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seek an employer's coercive assistance in collecting any fine that is imposed." *Id.* at 121 (Blackmun, J., dissenting). Justice Blackmun further observed: "The rule neither coerces a worker to become a union member against his will, nor affects an employee's status as an employee under the Act." *Id.* (Blackmun, J., dissenting). The dissent concluded: "Thus, [the rule] clearly falls within the power of any voluntary association to enact and enforce 'the requirements and standards of membership itself,' so as to permit the association effectively to pursue collective goals." *Id.* (Blackmun, J., dissenting) (quoting 93 CONG. REC. 4433 (1947) (remarks of Sen. Ball)).

[259] 489 U.S. 426, 428–29 (1989).

[260] *Id.* at 429–30.

[261] *Id.* at 430. The strike lasted 72 days, and during this time, TWA was able to hire only 2,350 permanent replacement workers. *Id.* at 430. In addition, 1,280 unionized flight attendants either did not strike at all or abandoned the strike and returned to work during the 72 days. *Id.* At the end of the strike, 5,000 flight attendants still were not working. *Id.*

[262] *TWA*, 489 U.S. at 430. The Court noted: "Thus, at the conclusion of the strike, senior full-term strikers would not be permitted to displace permanent replacements or junior nonstriking flight attendants and could be left without an opportunity to return to work." *Id.*

[263] *See id.* at 429–30. The Court summarized the effect of TWA's crossover strategy:

> TWA's promise not to displace working flight attendants after the strike created two incentives specifically linked to the seniority bidding system: it gave senior flight attendants an incentive to remain at, or return to, work in order to retain their prior jobs and domicile assignments; it gave junior flight attendants an incentive to remain at, or return to, work in order to obtain job and domicile

The *TWA* Court held that the Railway Labor Act ("RLA") does not require employers to replace junior crossovers with more senior strikers once the strike is over.[264] The union, conceding that *Mackay Radio* permitted TWA to hire permanent replacements, argued that its circumstances were distinguishable: here, crossovers from the bargaining unit were granted an employment preference by penalizing continuing strikers.[265] Citing the 1963 Supreme Court case of *NLRB v. Erie Resistor Corp.*, the union argued that TWA could not lawfully grant crossovers an employment preference that it did not also grant to continuing strikers.[266] The *Erie Resistor* Court had ruled that the granting of such an exclusive employment preference to crossovers creates a long-term division in the company between those loyal to the union and those who gained seniority by breaking the strike.[267] Thus, "[t]his breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general."[268] An employer's granting of special treatment to crossovers therefore weakens the concert paradigm by allowing employers to tamper internally with union solidarity and by penalizing workers who exercise their right to strike.[269]

> assignments that were previously occupied by more senior, striking flight attendants.

Id.

[264] *TWA*, 489 U.S. at 432. The case arose under the Railway Labor Act ("RLA"), which covers rail and air transport workers. 45 U.S.C. § 151 (1988). Construction of the RLA and NLRA often is identical; the Court noted that "carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA." 489 U.S. at 432.

[265] *See id.* at 434.

[266] *Id.* (citing NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963)). In *Erie Resistor*, the employer worked through the strike not only by hiring replacements, but also by granting strikers twenty years of super-seniority if they abandoned the strike and crossed their picket line. 373 U.S. at 230–31. Super-seniority is artificial seniority, commonly granted to local union officers regardless of their actual seniority. Workers with super-seniority tend to be immunized against the ordinary progression of layoffs, and also enjoy job-bidding advantages.

[267] *Erie Resistor*, 373 U.S. at 231.

[268] *Id.*

[269] *See TWA*, 489 U.S. at 447 (Brennan, J., dissenting). Justice Brennan remarked in dissent:

> More fundamental, I fear, is the legal mistake inherent in the Court's objection to 'penalizing those who decided not to strike in order to benefit those who did.' The Court, of course, does precisely the opposite: it allows TWA to single out for penalty precisely those employees who were faithful to the strike until the end, in order to benefit those who abandoned it. What is unarticulated is the Court's basis for choosing one position over the other. If indeed one group

The majority in *TWA*, however, characterized the penalty for strikers merely as a lost "gamble." Recognizing that workers under the RLA have a right to choose not to strike, the Court concluded that in almost all strikes, some employees will object to their union's decision to strike and that such employees cannot be compelled to accept such a decision.[270] Consequently, distinguishing crossovers from new hires would effectively penalize employees who chose not to strike to benefit employees who did strike.[271] The Court saw no reason why employees who did not gamble on the strike should have to suffer the results of an unsuccessful gamble.[272] *TWA* adds to the ambiguous character of the concert paradigm by narrowly construing a worker's right to strike. Although it leaves the right to strike intact, it adds to the penalties associated with the exercise of that right.

In sum, *Mackay Radio, Belknap, Pattern Makers League,* and *TWA* sharply restrict the concert paradigm. These decisions have not, however, broken the paradigm, because at no time has the paradigm expressly shielded strikers from employer hiring of permanent replacements.

D. *The Paradigm of Cartelization*

However much *Mackay Radio* and its recent progeny of Supreme Court decisions have discouraged strikes, and consequently, weakened the concert paradigm, these decisions have not *broken* the paradigm. If *Mackay Radio* were paradigm-breaking, essentially the same Democratic Congress and the same President who enacted the NLRA three years earlier would likely have repealed it. In fact, the decision created no ripple until the 1980s. Organized labor's adverse reaction to *Mackay Radio* was delayed by fifty years, suggesting that the striker replacement phenomenon is a symptom of more recent problems impinging on a worker's right to strike.

The right to strike has been seriously undermined on several fronts. The concentration of unionized workers in virtually all pri-

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> or the other is to be 'penalized' what basis does the Court have for determining that it should be those who remained on strike rather than those who returned to work? I see none, unless it is perhaps an unarticulated hostility toward strikes.

Id. (Brennan, J., dissenting).

[270] 489 U.S. at 436–37.

[271] *Id.* at 438.

[272] *Id.*

vate sector industries dropped sharply in the 1980s.[273] Consequently, many unions throughout the 1980s negotiated concessions, largely to keep unionized employers competitive with lower-cost nonunion employers.[274] Government deregulation of key and heavily unionized industries such as trucking,[275] airlines[276] and telecommunications[277] weakened collective bargaining by implicitly favoring nonunion firms and penalizing firms with comparatively costly collective bargaining agreements. To survive, some unionized firms had to confront unions aggressively. As a result, it is likely that some firms invoked the permanent replacement strategy as a heavy-handed bargaining tool.

The 1980s and 1990s also marked the globalization of much of the free world's economy. For American labor, globalization meant that heavily unionized industries such as autos,[278] steel[279] and textiles[280] could be moved to countries with much cheaper labor.

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[273] *See* Chaison & Rose, *supra* note 4, at 15. Between 1980 and 1989, union density—the proportion of the workers represented by unions—dropped in *every* sector of the economy except government employment. In mining, density fell from 32.0% to 17.5% in the period; in construction, from 30.9% to 21.5%; in manufacturing, from 32.3% to 21.6%; in transportation, communications and utilities, from 48.4% to 31.6%; in wholesale and retail trade, from 10.1% to 6.3%; in finance, from 3.2% to 2.3%; and in services, from 8.9% to 5.8%. *Id.* *See also* Curme et al., *supra* note 50, at 9.

[274] *See* Linda Bell, *Explaining Union Concessions in the 1980s*, FED. RES. BANK OF N.Y. Q. REV. 44 (Summer 1989); David J. Walsh, *Accounting for the Proliferation of Two-Tier Wage Settlements in the U.S. Airline Industry, 1983–1986*, 42 INDUS. & LAB. REL. REV. 50 (1988); Peter Cappelli, *Plant-Level Concession Bargaining*, 39 INDUS. & LAB. REL. REV. 90 (1985); Audrey Freedman & William E. Fulmer, *Last Rites for Pattern Bargaining*, HARV. BUS. REV., Mar.–Apr. 1982, at 30.

[275] For a general overview of trucking regulations, see Harold M. Levinson, *Trucking, in* COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 99 (Gerald G. Somers ed., 1980).

[276] For a general overview of airline deregulation, see Elizabeth E. Bailey et al., DEREGULATING THE AIRLINES 27–37 (1985).

[277] For a general overview of telephone deregulation, see Barry G. Cole, *Introduction, in* AFTER THE BREAKUP: ASSESSING THE NEW POST AT&T DIVESTITURE ERA 1 (Barry Cole ed., 1991). Between 1968 and 1972, while AT&T was a regulated monopoly, 86% of all workers in the telephone industry were covered by a collective bargaining agreement. Richard B. Freeman & James L. Medoff, *New Estimates of Private Sector Unionism in the United States*, 32 INDUS. & LAB. REL. REV. 143, 150 (1978). However, after deregulation, industry unionization rates plummeted to 64% in 1983–1985 and 49% in 1988. *See* Curme et al., *supra* note 50, at 17.

[278] Between 1979 and 1984, approximately 225,000 auto manufacturing jobs were lost in the U.S. *See* Paul O. Flaim & Ellen Sehgal, *Displaced Workers of 1979–1983: How Well Have They Fared?*, 108 MONTHLY LAB. REV. 3 (June 1985).

[279] Between 1979 and 1984, approximately 220,000 jobs in primary metals (primarily steel) were lost in the U.S. *See* Flaim & Sehgal, *supra* note 278, at 12–13.

[280] Between 1979 and 1984, approximately 212,000 textile jobs were lost in the U.S. *See id.* at 5.

The right to strike was obviously blunted by increased job mobility. In sum, it is likely that declining unionization, broader deregulation and increased job mobility weakened the right to strike in conjunction with the *Mackay Radio* doctrine of permanent striker replacements.

In organized labor's view, the *Mackay Radio* doctrine permitting an employer to hire permanent striker replacements completely undermines both workers' right to strike and the collective bargaining process.[281] In the 1990s, the primary legislative goal of the AFL-CIO has been passage of the Workplace Fairness Act, which would make an employer's hiring of permanent striker replacements an unfair labor practice.[282] Recognizing the importance of their right to hire permanent striker replacements, employers have strenuously argued against this bill.[283] In 1992, the Workplace Fairness Act

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[281] *See Prohibiting Permanent Replacement of Striking Workers: Hearing Before the Subcomm. on Aviation of the Comm. on Public Works and Transp., House of Representatives*, 102d Cong., 1st Sess. 114 (1991) [hereinafter *Aviation Hearing*] (testimony of Vicki Frankovich, President, Independent Federation of Flight Attendants). Ms. Frankovich stated:

> Our courts have made a mockery of federal statutes regulating and promoting collective bargaining. Congress has specifically *protected* the right to strike and has specifically prohibited employee discrimination based upon *the exercise* of that right. It is unlawful, Congress has said, for an employer to discharge or otherwise discriminate against an employee because that employee has exercised the right to strike. As illustrated by the IFFA-TWA post-strike litigation, the federal courts have, under the guise of interpretation, effectively repealed these statutes.

Id. (emphasis in the original). *See also id.* at 120 (testimony of George J. Kourpias, International Association of Machinists and Aerospace Workers). Mr. Kourpias stated:

> [T]he *Mackay* doctrine goes against the federal labor policy's most basic purpose. It approves of a harsh injustice against working men and women when they exercise their right to engage in concerted and protected union activity. This doctrine does violence to healthy relations between management and labor, and sickens the otherwise healthy concept of the collective bargaining relationship. I do not think I am exaggerating when I say that the *Mackay* doctrine threatens the very foundation of free collective bargaining.

Id.

[282] *See* H.R. 5, 102d Cong., 2d Sess. (1992). Weeks before the House vote on H.R. 5, the Workplace Fairness Act, the AFL-CIO aired television and radio ads in 20 key states with uncommitted legislators and provided more than 600 newspaper editors with fact-sheets answering questions about the bill. Muriel H. Cooper, *Union Members 'Fired Up' to Win Big on H.R. 5*, AFL-CIO NEWS, July 8, 1991, at 1, 3.

In appealing to senators to vote for the equivalent of H.R. 5, S. 55, AFL-CIO President Lane Kirkland said the bill was "the most important labor law initiative to come before Congress in more than a decade." Muriel H. Cooper, *Labor Mobilizes for Final Push on S. 55*, AFL-CIO NEWS, Mar. 30, 1991, at 1.

[283] *Labor Hearing*, *supra* note 64, at 138–39 (statement of Richard S. Hoyt). Mr. Hoyt stated on behalf of the U.S. Chamber of Commerce:

> My business, like many others, is labor-intensive and operates under severe time constraints. If I cannot provide my customers with a product within budget and

passed by vote of the House of Representatives but subsequently died in the Senate. The bill awaits re-introduction in the new congressional term, and organized labor is unlikely to abandon it.

The proposed bill would create two new unfair labor practices. These ULPs would make it unlawful for an employer 1) to hire permanent replacements for strikers and 2) to grant an employment preference to someone working through a strike without offering the same preference to continuing strikers.[284] These two provisions are clearly aimed at repealing the permanent striker replacement doctrine in *Mackay Radio* and the preferential-benefit-to-crossovers holding in *TWA*.

If it had passed, this law would have been paradigm-breaking because it would have given organized labor unprecedented control over the supply of labor available to an employer during a strike. This Article's analysis of statutes and common law decisions during the combination, conspiracy and concert paradigms disclosed no public policies that resulted in an express limitation on the quantity or quality of replacements available to employers during a strike. In contrast, this proposed law would exclude a large segment of an employer's relevant labor market from competing with strikers for

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> on time, they will find a contractor who can. Disruptions caused by labor disputes are costly and counterproductive in any industry, but especially in the construction industry, where work is performed sequentially. A work stoppage caused by a labor protest at a critical stage of a multiemployer construction project can bring the entire project to a standstill, affecting many other employers and their employees. It is vital that contractors have the flexibility to complete a project, where necessary, using permanent replacements for striking workers or subcontractors involved in a labor dispute. . . . Unfortunately, [the striker replacement bill] will not only encourage labor disputes but also will severely restrict an employer's ability to continue operations during those disputes.

Id.

[284] *See* H.R. 5 & S. 55, 102d Cong., 2d Sess. (1992) (proposing to amend the National Labor Relations Act by making it an unfair labor practice for employers "to offer, or to grant, the status of permanent replacement employee to an individual performing bargaining unit work for the employer during a labor dispute"). This provision would repeal the holding of *Mackay Radio*. The second provision would repeal the holding of *TWA* by making it an unfair labor practice:

> [T]o otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who— (A) was an employee of the employer at the commencement of the dispute; (B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and (C) is working for, or has unconditionally offered to return to work for the employer.

their vacated positions. In effect, the proposed law would put striking employees in the position of exercising cartel power *vis-a-vis* their employer.

A cartel consists of an agreement by two or more producers to "maximize their profits by agreeing to set the monopoly price and to limit their output to the monopoly output."[285] Although this definition pertains to sellers of products, it readily applies to workers, sellers of labor. The law would cartelize strikers by treating their collective bargaining position as a workers' agreement to maximize wages and working conditions by exercising monopoly power over an employer's supply of labor. Employers would experience a labor-cartelization effect because the only available workers would be strikers—the very workers who agreed among themselves to maximize wages and working conditions by withholding their labor.

How would the proposed law accomplish this? After all, in theory employers would be free to hire from the same pool of substitute labor as before, because the law would place no express limitation on that labor pool. In practice, however, the legal prohibition against hiring *permanent* striker replacements would sharply limit the substitute labor pool.

The 1991–1992 Caterpillar strike provides a compelling illustration. In that strike, tens of thousands of potential labor-substitutes immediately answered employer ads to serve as striker replacements.[286] Many expressed a willingness to move to distant cities for the promise of a *permanent* position.[287] Anecdotal accounts suggest that a large number of replacements would have been employed workers wishing to leave their jobs for substantially better wages and benefits at Caterpillar.[288] Common sense suggests, however, that many fewer of these substitutes would leave their present jobs, and in some cases relocate, only for a *temporary* job at a struck employer. A struck employer, then, would find its labor pool essentially reduced to unemployed people located nearby and strikers. Particularly for employers who rely on a skilled workforce, the proposed

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[285] RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS 96 (1981). *See also* Richard Posner, *Some Economics of Labor Law, in* LABOR LAW AND THE EMPLOYMENT MARKET 44, 46 (Richard A. Epstein & Jeffrey Paul eds., 1985) (proposing that much of labor law amounts to an effort to cartelize labor markets at the expense of labor market efficiency); Morgan O. Reynolds, *The Myth of Labor's Inequality of Bargaining Power*, 12 J. LAB. RES. 167, 179 (1991) (arguing that protective labor laws are "interventions to foster cartelization of labor markets").

[286] Dine, *supra* note 25, at 10A.

[287] *Id.*

[288] *See For UAW, 'A Question of Survival,' supra* note 20, at 1.

law's restriction would virtually cut off the supply of qualified replacement workers: there would be no effective working through strikes.[289]

V. Conclusions

At no time have any of the current or past striker replacement paradigms granted workers labor-cartelization powers during economic strikes. Organized labor's view that *Mackay Radio*'s doctrine of permanent striker replacements is an aberration in national labor policy is therefore unfounded.[290] The proposed law would establish a desirable public policy because it would restore the balance of power that existed between employers and workers before its erosion in the 1980s and 1990s. This restoration of balanced bargaining power between workers and employers is the proper rationale for repealing *Mackay Radio*'s doctrine of permanent striker replacements. This Article demonstrates that there is no historical precedent for repealing the *Mackay Radio* doctrine, and so such a repeal would be paradigm-breaking. Paradoxically, the paradigm of concert envisioned under the NLRA can no longer be achieved without a public policy that is paradigm-breaking, because trade is much more global, jobs are much more mobile and employer power to frustrate union organization is much greater than it was in 1935.

The NLRA's policy prescription favoring equality of bargaining power between workers and employers follows the American philosophical tradition of balancing power between competing factions. It was Madison, not Marx, who observed that

> the most common and durable source of factions has been the verious [sic] and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide themselves into

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[289] *See Aviation Hearing*, *supra* note 281, at 193–94 (statement of Professor David Westfall, Harvard Law School). Professor Westfall stated:

> Although some struck employers operate with supervisors and non-striking employees and others manage with temporary replacements, it is difficult to imagine others doing so successfully. Skilled employees are unlikely to be willing . . . to fill a striker's job without some assurance that they are not subject to discharge whenever the striker offers to return.

Id.

[290] *See Labor Hearing*, *supra* note 64, at 56 (statement of Owen Bieber, President, UAW).

> different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation. . . .[291]

By virtually all measures, including extremely low strike activity, power in the American industrial relations system has tilted in favor of employers. Whatever inconveniences and harm to the economy resulted from earlier periods of increased strike activity, that activity occurred within a system of regulated conflict. The danger in failing to restore the balance of power between unions and employers is that unions will wither away, employer power will grow unchecked, and worker frustration will be left to combust outside the arena of institutionalized conflict.

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[291] *See* THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).